TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 453.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES R. GAINEY, Jr., ADMINISTRATOR *DE BONIS NON* OF THE ESTATE OF RICHARD DWYER, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MAY 5, 1915.

(24,705)

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1 COMMONWEALTH OF KENTUCKY:

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 29th Day of January, A. D. 1915.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Appeal from the Boyd Circuit Court.

Be it remembered that heretofore on the 21st day of August, 1913, and on the 12th day of December, 1914, the appellant, the Chesapeake & Ohio Railway Company, by its counsel filed in the Clerk's office of the Court of Appeals of Kentucky transcripts of record on appeals in the above styled case, which transcripts contain the following Pleadings, Orders, Bill of Exceptions, etc., ordered to be copied for the Supreme Court of the United States by the præcipe filed by the appellant and plaintiff in error in said case, to-wit:

2 Pleas Before the Hon. W. C. Halbert, Judge of the Twentieth Judicial District of Kentucky and Sole Judge of the Boyd Circuit Court, at the Court House, at Catlettsburg, on the 20th day of March, 1913.

Be it remembered that on the 21st day of February, 1911, the plaintiff, Sarah Dwyer, Administratrix of the estate of Richard Dwyer, deceased, produced and filed in the Clerk's office of the Boyd Circuit Court, her original petition, against the Chesapeake & Ohio Railway Company, Defendants, and upon the back of which petition appears the following endorsement:

"Filed February 21st, 1911. Summons and copy issued.
PAUL POAGE, *Clerk.*
By S. M. WYLIE, *D. C.*

Said petition is in words and figures following, to-wit:

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Petition.

The plaintiff, Sarah Dwyer, says that Richard Dwyer departed this life intestate on the 12th day of May, 1910, while a resident

of and domiciled in Boyd County, Kentucky; and, that on the 8th day of June, 1910, she was by the Boyd County Court duly appointed administratrix of the estate of Richard Dwyer, gave bond and qualified according to law, and is now acting as such, and that said decedent left surviving him who were dependent upon him
3 for their support and maintenance a widow and children.

That the defendant, The Chesapeake and Ohio Railway Company, is a corporation created and organized under the laws of the State of Virginia, with power to sue, be sued, contract and be contracted with as a natural person, and with the power to run and operate a line of railway from and through the States of Virginia, West Virginia, to and through the State of Kentucky, and was and is a common carrier of both passenger- and freight, and was at the time of the wrongs and injuries hereinafter complained of engaged in carrying freight and passengers into and between the different States and was at the said time engaged in interstate commerce.

She states that on said date, to-wit: the 12th day of May, 1910, while her said decedent, Richard Dwyer was in the employment of the defendant and working and laboring for it as an engineer on one of its engines pulling with said engine its train of cars loaded with freight and being hauled and carried by it from this State to others and while he was engaged in interstate commerce for the defendant hauling and pulling said train of cars as aforesaid from Pikeville, Pike County, Kentucky, to and through Boyd County, Kentucky, to other states he was by the gross negligence and carelessness of the defendant, its agents and servants in charge of said train and engines, injured and killed.

She states that on the right of way of the defendant South of the City limits of the City of Catlettsburg, in Boyd County, Kentucky, where its said line of road runs and over which said decedent was operating the engine with its train of cars, aforesaid, the defendant in building its said line of road had made a deep cut about thirty (30) feet in depth, and in making said excavation and cut aforesaid to build and lay its road and tracks thereon it left upon the side of said cut and excavation about thirty (30) feet high above
4 the said tracks and road a large rock dangerously overhanging the track.

She says that on said night of the 12th day of May, 1910, the said rock with a large lot of graval, dirt and earth and other rock, in and near same, fell from said side of said excavation into the tracks of the defendant, aforesaid, and that while he was operating said engine, train and cars in the rear of an engine in front of his aiding and assisting in pulling said train of cars, ran into and upon said rock, earth and stone with said engine train and cars, aforesaid, thereby causing same to turn over and fall upon him thereby injuring and killing him as aforesaid.

She further says that said defendant, its agents and servants in charge of said road bed and tracks whose duty it was to look after, repair and keep same in a safe condition knew that said rock was hanging upon the side of said excavation in a dangerous condition and likely at any time to fall down upon said right of way and

racks, thereby endangering the lives of the employees operating engines and trains over and upon said track, in time to have prevented said injury and death of said decedent, but negligently and carelessly failed to use care to remove same from said place, and thereby caused the death of said decedent, or by the exercise of ordinary care on their part could have known of same in time to have prevented the injuries and death of said decedent, but negligently and carelessly failed to do so, and that by reason of same caused the death of said decedent, aforesaid.

She says that in front of and attached to the engine which was being operated by her decedent on said occasion was another engine assisting in pulling the train of cars aforesaid, and which was being operated by an engineer and fireman in the employment of the said defendant, and that the injuries and death of her said decedent occurred in the night time about 11 o'clock p. m. on said date at a time when it was dark; and that the equipment of said engines were defective in equipment in this; that the defendant failed to furnish and supply them with good and sufficient headlights so as to enable the employees thereon to see obstructions on the track in front thereof; that the lights furnished and supplied said engines by said defendant were insufficient and defective and would not and did not furnish sufficient light to safely operate them on said occasion, and that the defendant knew that said lights were insufficient, defective and not sufficient to operate said train and cars in the night time safely, but that her decedent did not know of same, and that said defective and insufficient lights contributed to and caused the injuries and death of decedent aforesaid.

She says that by reason of all of which she has sustained damages in the sum of Forty Thousand Dollars ($40,000.00).

Wherefore, she prays judgment against the defendant for damages in the sum of Forty Thousand Dollars ($40,000.00) for costs and all proper relief.

DINKLE & PRICHARD,
Attorneys for Plaintiff.

The plaintiff, Sarah Dwyer, says that the statements in the foregoing petition are true as she verily believes.

—— ——.

Subscribed and sworn to before me by Sarah Dwyer, this the — day of ——, 1911.

My commission expires on the — day of ——, —.

—— ——,
Notary Public in and for
Boyd County, Kentucky.

6 At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 18th day of March, 1913, the following order was made:

Order Noting Answer.

SARAH DWYER, Adm'x, etc., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The defendant this day produced its answer herein, which is filed.

Said answer is as follows, to-wit:

Answer.

SARAH DWYER, Adm'x of Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Comes the defendant and for answer to the petition of plaintiff herein, it denies, that he was injured or killed by the gross or any negligence or carelessness of this defendant, or its agents or servants in charge of said train or engine. It denies that defendant, or its agents or servants in charge of said train or said engine, were grossly or at all negligent or careless. It denies that defendant's line of railway at the point where the accident described in the petition occurred, is located in a cut 30 feet in depth, or that said cut is of a greater depth than 10 feet. It denies that it left on the side of said cut a large or any rock, or that same was dangerously or
7 at all overhanging the track. It denies that defendant, or its agents or servants in charge of defendant's roadbed or track knew in time to have prevented the injury to, or death of, decedent, or at all, that said alleged rock was hanging on the side of said excavation, or that same was in a dangerous condition or likely to fall upon said right of way or tracks, or to thereby or at all endanger the lives of defendant's employees operating engines or trains over or upon said track, or that defendant, or its said agents or servants negligently, or carelessly, or at all, failed to use care to remove same from said place, or by reason of said alleged failure caused the death of decedent. It denies that it, or its said agents or servants, by the exercise of ordinary or any care on their part, could have known of the alleged presence of said rock in time to have prevented the injuries to, or death of decedent. It denies that it, or its said agents or servants negligently, or carelessly, or at all, failed to do so, or that the death of said decedent resulted from any negligence or carelessness on the part of this defendant, or its agents or servants. It denies that said rock was hanging on the side of said excavation, or that same was in a dangerous condition, or that same was liable at any time, or at all, to fall down upon said right of way or tracks, or that same endangered the lives of defendant's employes operating engines or trains over or upon said track. It denies that defendant knew of said alleged condition or could, by the exercise of ordinary

care, have known same. Defendant denies that the equipment of said engines hauling the trains described in the petition, or either of them, were defective in their equipment. It denies that it failed to furnish or supply good or sufficient headlights. It denies that
8 the lights furnished or supplied said engines were insufficient or defective or that same would not, or did not, furnish sufficient light to safely operate same on the occasion of the accident and injury complained of in the petition. It denies that it knew that said lights were insufficient or defective, or that decedent did not know of same. It denies that said alleged defective or insufficient lights contributed to or caused the injuries or death of the decedent. It denies that plaintiff has been damaged in the sum of $40,000.00 or any other sum. Wherefore &c.

Par. 2. Defendant further answering states that at the time and on the occasion complained of in the petition, plaintiff's decedent was himself guilty of negligence which contributed to said accident and injury, and but for such contributory negligence on his part, said accident would not have happened nor the injuries have been received, nor his death have occurred. Wherefore, defendant pleads and relies on the above facts in bar of plaintiff's right to recover in this action.

Par. 3. Defendant further answering states that the plaintiff's intestate was an employe of this defendant, and that in entering and remaining in the service of this defendant, he assumed certain risks and dangers incident to said service; that by his contract of service with this defendant he assumed all the ordinary risks and dangers incident to his said employment, among which was the risk of injury set up in the petition. Defendant states that the danger of injury resulting from the falling of dirt or rock upon defendant's track at the time and place of the accident described in the petition, was a risk assumed by the plaintiff in entering the employment of defendant as incident to his service and to the operation of railroad trains; that the falling of said dirt or rock on defendant's
9 track, and the resulting derailment of the train or engine upon which decedent was working, could not have been avoided by the exercise of ordinary care or skill on the part of defendant, or its agents or servants; that the said derailment of said train was a risk assumed by the decedent as a part of the terms of his employment; that decedent was acquainted with the fact of said cut and with the danger, if any, of dirt or rock falling therefrom, that the danger of accident and injury therefrom was open, obvious and known to decedent before and at the time of his injury. Defendant further states that the headlights upon the engines described in the petition were such as he was entirely familiar with; that the alleged defective or insufficient condition of said headlights, if any, and the danger of accident or injury therefrom, were open and obvious and known to plaintiff before and at the time of his injury. Defendant states that as and for a part of the terms of his employment, the decedent assumed the risks of injury from the foregoing dangers, and it pleads and relies on the facts herein set up as a bar to plaintiff's right to recover damages herein.

Wherefore, having fully answered, defendant prays that it may be hence dismissed, with its costs herein expended.

WORTHINGTON, COCHRAN & BROWNING,
Counsel for Defendant.

10 At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 18th day of March, 1913, the following order was made:

Order Noting Reply.

SARAH DWYER, Adm'x, etc., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The plaintiff this day produced her reply, herein which is filed.

Said reply is as follows, to-wit:

Reply.

SARAH DWYER, Adm'x of the Estate of Richard Dwyer, Deceased, etc., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Par. 1. The plaintiff, for reply herein, denies that at the time or on the occasion complained of in the petition, plaintiff's decedent was himself guilty of negligence, or that such negligence contributed to said accident or injury, or that but for such contributory negligence on his part said accident would not have happened nor the injuries have been received, nor his death have occurred.

11 Par. 2. Plaintiff denies that in entering or remaining in the service of defendant her intestate assumed certain risks or dangers incident to said service, or that by his contract of service with the defendant he assumed all or any of the ordinary risks or dangers incident to the saie employment, or among which was the risk of injury set up in the petition. Defendant denies that the danger of injury resulting from the falling of dirt or rock upon defendant's track at the time or place of the accident described in the petition was a risk assumed by plaintiff in entering the employment of defendant, or as incident to the service or to the operation of railroad trains.

Plaintiff denies that the falling of said dirt or rock on defendant's track and the resulting derailment of the train or engine upon which decedent was working could not have been avoided by the exercise of ordinary care or skill on the part of the defendant, or its agents or servants, or that the said derailment of said train was a risk assumed by the decedent as a part of the terms of his employment, or that decedent was acquainted with the fact of said cut, or with the

danger of dirt or rock falling therefrom, or that the danger of accident or injury therefrom was open or obvious, or known to decedent before or at the time of his injury.

Plaintiff denies that the headlights upon engines described in the petition were such as decedent was entirely, or at all, familiar with, or that the defective or insufficient condition of said headlights or danger of accident or injury therefrom were open, or obvious, or known to plaintiff before or at the time of his injury. Plaintiff denies that as or for a part of the terms of his employment the decedent assumed the risks of injury from the said dangers, or any of them.

Wherefore, plaintiff prays as in her petition.

GEO. B. MARTIN,
DINKLE & PRICHARD,
Attorneys for Plaintiff.

12 At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 19th day of March, 1913, the following order was made:

Trial.

SARAH DWYER, Adm'x Richard Dwyer, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The parties this day appeared by their attorneys, thereupon came a jury, to-wit: David Rucker, G. S. T. Griffith, James Reynolds, James B. Dixon, Milt Rice, Samuel Cyrus, Wm. Gray, John A. Plaffenberger, Andy Scott, I. S. Collins, John P. Creighton, John Fowler, who were duly sworn to try the issue, and having heard the evidence in full, and being unable to complete the trial, were admonished by the Court and adjourned until 9 o'clock tomorrow morning.

At a Circuit Court Began and held for Boyd County, at the Court House in Catlettsburg, on the 20th day of March, 1913, the following order was made:

Judgment.

SARAH DWYER, Administratrix of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

13 The jury sworn herein on yesterday, the 9th day of the present term, this day reappeared in their seats, and having received the instructions of the Court, and having heard the argument of counsel, retired to their room to consider of a verdict, and later returned into the Court room with the following verdict, viz:

"We, the jury, agree and find for the plaintiff the sum of Fourteen Thousand Dollars, $14,000.00.

(Signed) JNO. P. CREIGHTON,
One of the Jury."

It is therefore adjudged by the Court, that the plaintiff, Sarah Dwyer, Administratrix of the estate of Richard Dwyer, deceased, recover of the defendant, The Chesapeake and Ohio Railway Company, the sum of Fourteen Thousand Dollars ($14,000.00) with interest thereon at the rate of 6% per annum from the 20th day of March, 1913, until paid and her costs herein duly expended.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 21st day of March, 1913, the following order was made:

Order Noting Motion and Grounds for New Trial.

SARAH DWYER, Adm'x., etc., Plaintiff,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

This day came the defendant and produced and filed its motion and grounds for a new trial herein, and the Court being sufficiently advised, it is ordered that the same be and it is hereby over-
14 ruled, to which the defendant excepts, and prays an appeal to the Court of Appeals, which is granted accordingly; and upon motion of the defendant it is given until and including the tenth (10th) day of the next April Term of this Court within which to prepare and tender its Bill of Exceptions herein.

Said Motion of Grounds for new trial are as follows, to-wit:

Motion and Grounds for New Trial.

SARAH DWYER, Administratrix of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILWAY COMPANY, Defendant.

The defendant, Chesapeake and Ohio Railway Company, moves the Court to set aside the verdict and judgment herein and grant it a new trial upon the following grounds to-wit:

1st. The verdict is contrary to law.
2nd. The verdict is not supported by the evidence.
3rd. The amount of damages is excessive and so much as to indicate that it was the result of passion and prejudice.
4th. The Court erred in admitting irrelevant and incompetent testimony offered by plaintiff, which was objected to at the time by plaintiff.

5th. The Court erred in refusing to admit competent and relevant testimony offered by defendant.

6th. The Court erred in refusing to grant defendant's motion for peremptory instruction made at the conclusion of plaintiff's testimony.

15 7th. The Court erred in refusing to grant defendant's motion for a peremptory instruction made at the conclusion of all testimony.

8th. The Court erred in giving instructions marked 1, 3, 4 and 5.

To each of the errors complained of defendant excepted at the time each was made.

WORTHINGTON, COCHRAN & BROWNING,
Attorneys for the Defendant.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, on the 6th day of May, 1913, the following order was made:

Order Filing Bill of Exceptions.

SARAH DWYER, Adm'x of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

This day came the defendant and produced and tendered its Bill of Exceptions herein, and same having been examined and found to be correct, it is now ordered that same be filed, and signed, sealed, approved and made a part of the record herein, without being spread at large upon the order book, all of which is accordingly done.

16 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky on February 25, 1914, the following orders and judgments were entered, to-wit:

Judgment of Court of Appeals.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from the Boyd Circuit Court.

The court being sufficiently advised it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for a new trial consistent with the opinion herewith. Which is ordered to be certified to said Court.

It is further considered that appellant recover of appellee its costs herein expended.

At the same time, to-wit, February 25, 1914, the Court of Appeals of Kentucky delivered the following opinion, to-wit:

17 Court of Appeals of Kentucky, February 23, 1914.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from the Boyd Circuit Court.

Opinion of the Court by Judge Settle, Reversing.

Richard Dwyer, who was a locomotive engineer in the employ of the appellant, Chesapeake & Ohio Railway Co., was killed May 12, 1910, at England Hill in Boyd County, Kentucky, by the derailment of a part of a train upon which he was at the time employed as such engineer. The train was a freight train, being operated by two engines, the second engine being the one of which the decedent had charge.

At the place of the accident the railroad track is located in a cut the banks of which arise in height several feet above that of a train. The accident was caused by a land-slide from one side of the cut, which caused rocks and earth to be deposited upon the track in such quantities that when struck by the moving train the two engines and several cars thereof were derailed and the decedent, being thrown under the engine of which he was in charge, received injuries which shortly thereafter resulted in his death. This action was brought by the appellee, Sarah Dwyer, the widow of the decedent and
18 administratrix of his estate, to recover of appellant damages for his death, the recovery being sought under the act of Congress known as the "Employers' Liability Act," approved April 22, 1908, as amended by the act of April 5, 1910; the petition averring the facts necessary to bring the action within the purview thereof. There were three grounds of negligence alleged, first, negligence of appellant's servants, other than the decedent, in charge of the train, in the manner operating same; second, negligence of the appellant in failing to equip the engines with sufficient headlights; third, negligence of the appellant and its servants in failing to take the proper precautions to prevent the fall of debris upon the railroad track at the place of the accident. We gather from the record, however, that the third ground of negligence mentioned was the only one relied upon for the recovery; and in support thereof evidence was introduced by appellee which strongly conduced to prove that the side of the cut from which the land-slide came had, for some months prior to the accident, been in a more or less dangerous condition because of the presence of overhanging rocks and loose dirt, which gave notice to appellant of the danger to be apprehended from a land-slide and of the necessity of taking such precautions as, by the use of ordinary care could have been employed to prevent the same, and which, if employed, would have prevented

the accident and consequent death of the decedent. On the other hand, in support of the denials of negligence contained in its answer, appellant introduced considerable evidence to the effect that the side of the cut gave no indication of danger or of the probability of a land-slide; and further, that the accident could not have been anticipated or prevented by it.

The trial resulted in a verdict and judgment in appellee's favor for $14,000 damages. Appellant was refused a new trial, hence this appeal.

It is not contended by appellant's counsel that the verdict was not authorized by the evidence, but it is insisted by them that the judgment should be reversed because of error committed by the trial court in instructing the jury as to the measure of damages. The instruction on that subject is as follows: "The jury are instructed that if they should find for the plaintiff, then they will from the evidence find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate the estate of the decedent, Richard Dwyer, for the destruction of his power to earn money, caused by his death, not exceeding, however, the sum of $40,000, the amount claimed in the petition." Counsel concede that the instruction correctly states the measure of damages applicable to actions for death brought under section 6, Ky. Statutes, but contend that it is not applicable to actions brought under the Federal Statute, arguing that the damages recoverable under the latter statute are not such as will compensate the estate of the deceased employee for the destruction of his power to earn money, but such as will compensate his surviving relatives for the actual pecuniary loss resulting by reason of his death to the particular person or persons for whose benefit the statutory right of action is given. We are constrained to sustain this contention, indeed, in effect, have heretofore done so in the case of I. C. R. R. Co. vs. Doherty's Adm'r, 153 Ky., 363, in which a recovery was refused the administrator of an employee of the railroad company alleged to have been killed, while engaged in interstate commerce, by the negligence of its servants in operating one of its trains, because of the failure of the petition to allege, and of the evidence to show, that the deceased employee left surviving him a beneficiary or beneficiaries in whose behalf the recovery could be had. In the opinion we said:

"It is clear that the act does not like the Kentucky statute applicable to similar cases, allow a recovery merely to compensate the estate of the decedent for his death and the consequent destruction of his power to earn money, but provides that only those naturally or actually dependent upon the decedent shall take the benefit of the recovery. It, therefore, expressly limits the right of recovery to cases in which only the person or persons sustaining pecuniary loss by the decedent's death are entitled to be compensated, viz; the beneficiaries named, in the order named. This being so, it necessarily follows that in an action under the act of Congress if there is no one for whom a recovery can be had, there can be no recovery.

Proof must, therefore, be made of the existence of such sur-
21 viving beneficiary or beneficiaries; and, if necessary to be proved as an element essential to a recovery, it is an issuable fact that must be alleged. So, if the petition in such an action fails to allege that the decedent is survived by a person or persons coming within the indicated limitation, it is bad on demurrer."

This question seems to have been authoritatively settled by several recent decisions of the Supreme Court of the United States, declaratory of the liability imposed by the act in question and the measure of recovery thereunder, and we will now consider some of these cases. In Mich. Cent. R. R. Co. vs. Vreeland, 227 U. S., 59, (decided January 20, 1913), a recovery was sought under the federal statute for the widow of an employee who was killed by the railroad company while engaged in interstate commerce. In the opinion it is said:

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds: 'or in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such
22 injury or death,' etc." * * *

"This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only." * * *

"The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being,—that of 9 and 10 Vict. chap. 93, known as Lord Campbell's Act. This act has been, in its distinguishing features, re-enacted in many of the states, and both in the courts of the states and of England, has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation pecuniarily resulting to them from his wrongful death." * * * "The word 'pecuniary' did not appear in Lord Campbell's act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."

23 "A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judi-

cially, not only to express the character of that loss to the beneficial plaintiffs, which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation. Patterson, Railway Acci. Law, sec. 401."

In the yet more recent case of G. C. & S. F. Ry. Co. vs. McGinnis, 228 U. S. 173, which was an action for the death of an employe caused by the negligence of the railroad company brought under the Federal statute in a state court of Texas by his widow, as administratrix, for her benefit and that of their four children, one of the latter being a married daughter residing with her husband; it was held both by the trial court and the Court of Civil Appeals, that the statute expressly authorized the suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him or had the right to expect any pecuniary assistance from him. In passing on this ruling the Supreme Court of the United States in the opinion delivered said:

"This construction of the character of the statutory liability imposed by the act of Congress was erroneous. In a series of
24 cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss. Michigan C. R. Co. vs. Vreeland, 227 U. S. 59; American R. Co. vs. Didricksen, 227 U. S. 145. In the last cited case, speaking of the employers' liability act, we said:

" 'The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained.' "

"The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount,
25 the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

It is manifest from the authorities, supra, that the trial court did not, by the instruction quoted in the opinion, correctly advise the jury as to the measure of damages. The recovery should have

been confined by the instruction on the measure of damages, in the event of a finding for the plaintiff, to such a sum in damages as would reasonably compensate the widow and children of the decedent for such pecuniary benefits as the evidence might show they had a reasonable expectation of receiving from the decedent, if his death had not been caused by the negligence of the defendant, if it was so caused; and after thus finding for the plaintiff a sum sufficient to compensate all the beneficiaries named, it should have been apportioned by the jury among the beneficiaries, stating in their verdict how much, if anything, they find for each of them; the damages altogether not to exceed the amount claimed in the petition. It is not apparent from the record before us, however, that the court could have intelligently instructed the jury at all on the measure of damages for the petition only alleges that "said decedent left surviving him, who were dependent upon him for their support
26 and maintenace, a widow and children." It is nowhere stated in the petition how many children there were or the age of any of them; and the evidence, strange to say, is wholly silent on the subject of the children. We must take it for granted that there were children, because the averment in the petition to that effect is not denied by the appellant's answer. So, in view of the failure of the petition to state, and of the evidence to show, the number of children and also their dependence upon the decedent, while living, for maintenance, it would have been practically impossible under the circumstances for the court to have guided the jury by a proper instruction on the question of the damages to be awarded.

Our attention has been called by the brief of appellee's counsel to the case of L. & N. R. R. Co. vs. Stewart's Adm'x, 156 Ky, 550, brought under the Federal statute, an expression in the opinion of which apparently approves such an instruction on the measure of damages as that complained of in the instant case. It is only necessary to say that the inadvertent statement referred to, has been corrected in response to a petition for a rehearing filed in the case, and, that as modified by the response, the opinion does not conflict with the conclusion expressed in this case.

It is insisted for appellee that, as appellant did not on the
27 trial offer a correct instruction on the measure of damages, it is estopped to ask a reversal of the judgment appealed from because of the giving of the incorrect instruction by the trial court on that subject. This contention must be overruled. It is true that an instruction on the measure of damages was not offered by appellant, but such failure did not relieve the trial court of the duty of correctly instructing the jury on that subject. Having attempted to give an instruction on that feature of the case, it was the duty of the court to state it in correct form. Its failure to do so was prejudicial to the rights of appellant, and, as it objected to the instruction as given, it is not estopped to insist upon a reversal of the judgment because of the error committed by the trial court in giving the instruction. I. & E. Ry. Co. vs. Crawford, 155 Ky., 723; South Cov. & C. St. Ry. Co. v. Core, 29 R. 836.

Because of the error of the trial court in failing to properly instruct the jury on the measure of damages, the judgment is reversed and cause remanded for a new trial consistent with the opinion.

Worthington, Cochran & Browning, Maysville, Ky., for Appellant.
Dinkle & Prichard, George B. Martin, Catlettsburg, Ky., for Appellee.

(Endorsed:) Feb. 25, '14. C. & O. vs. Dwyer's Adm'r'x.

28 Afterwards on the 2nd day of April, 1914, the mandate of the Court of Appeals of Kentucky issued on the foregoing judgment in words and figures following, to-wit:

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals, February 25, 1914.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
against
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from a Judgment of the Boyd Circuit Court.

The Court being sufficiently advised is seems to them the judgment herein is erroneous.
It is therefore considered that said judgment be reversed and cause remanded for a new trial consistent with the opinion herein.
Which is ordered to be certified to said Court.

ROBT. L. GREEN, *C. C. A.*,
By A. ADDAMS, *D. C.*

29 SARAH DWYER, Adm'x, &c., Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The plaintiff this day produced her amended petition herein which is filed.
Said amended petition is as follows:

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Plaintiff, for amendment to her petition herein says that the averment in her original petition that decedent, Richard Dwyer, left surviving him children dependent upon him for support and maintenance was a mistake and is hereby withdrawn.
Plaintiff says that the only child left surviving said decedent was

married at the time of his death and was not dependent upon him for her maintenance and support. Plaintiff says that she, this plaintiff, is and was the sole dependent surviving beneficiary of the cause of action herein set forth under the Federal Employers' Lia-
30 bility act; that at and before the time of the decease of Richard Dwyer, she was his wife; was — years of age at the date of his death, and was at said time and theretofore solely and entirely dependent upon said decedent for her maintenance, livelihood and support; that by reason of his death, she, as beneficiary, was and is damaged and has suffered pecuniary loss in the sum of forty thousand Dollars.

Wherefore, plaintiff prays for judgment as in her original petition.

DINKLE & PRICHARD AND
GEORGE B. MARTIN,
Attorneys for Plaintiff.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 24th. day of June, 1914, the following order was made.

31 SARAH DWYER, Adm'r'x of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The plaintiff this day produced in open Court the Mandate of the Court of Appeals herein, which is filed and ordered to be recorded, and is as follows:

Copied on page 28 of this record.

32 SARAH DWYER, Administratrix of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

By agreement of the parties hereto, it is ordered that the affirmative allegations of plaintiff's amended petition filed herein, be now traversed of record.

At a Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 24th. day of June, 1914, the following order was made.

SARAH DWYER, Adm'r'x of Richard Dwyer, Deceased, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The parties this day appeared by their attorneys, thereupon came a jury to wit: Stephen Bryant, Lewis Rowe, William Caveron, Joseph Stewart, Hugh Faulkner, A. T. Gilley, William Williams,

Almon Darby, J. L. Rucker, T. R. McGlothlin, E. V. White, J. M. Standley, who were duly sworn to try the issue, and having
33 heard the testimony on behalf of the plaintiff, and being unable to complete the trial, were admonished by the Court and adjourned until 9 o'clock tomorrow morning.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 25th. day of June, 1914, the following order was made.

SARAH DWYER, Administratrix of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

The jury sworn herein on yesterday, the 15th. day of the present term, this day reappeared in their seats in the jury box and having heard the testimony in full, and received the instructions of the Court, and having heard the argument of counsel retired to their room to consider of a verdict, and later returned into the Court room with the following verdict, to-wit:

34 "We, the undersigned jurors agree and find for the plaintiff, in the sum of $16,000 sixteen thousand dollars."

JOE STEWART.
S. H. BRYANT.
ALMON DARBY.
HUGH FAULKNER.
LOUIS ROWE.
J. L. RUCKER.
T. R. McGLOTHLIN.
WILLIAM CAVERON.
A. T. GILLEY.

It is therefore adjudged by the Court that the plaintiff Sarah Dwyer, Administratrix of Richard Dwyer, Deceased, recover of the defendant, Chesapeake & Ohio Railway Company, the sum of sixteen thousand ($16,000.00) Dollars, with interest thereon, at the rate of six per cent per annum, from the 25th day of June, 1914, until paid, and her costs herein duly expended.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 26th day of June, 1914, the following order was made:

SARAH DWYER, Adm'r'x, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY Co., Defendant.

The defendant this day produced its motion and Grounds for a new trial herein, which are filed and thereupon moved the Court

for a new trial of this cause, and this cause is submitted on said motion.

35 Said motions & Grounds for a new trial herein are as follows:

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Comes the defendant, Chesapeake & Ohio Railway Company and moves the Court to set aside the verdict of the jury, in this case and the judgment of the Court entered therein and to grant it a new trial thereof, and assigns these its grounds in support of said motion:

First. Because the verdict is contrary to law.

Second. Because the verdict is opposed to the overwhelming weight of evidence.

Third. Because the amount of the verdict is excessive and so excessive that same appears to have been given under the influence of passion and prejudice.

Fourth. Because of error of the Court in excluding certain competent, relevant and material testimony offered by defendant, to which action of the Court the defendant at the time and in each instance objected and excepted.

Fifth. Because of error of the Court in admitting certain incompetent and irrelevant testimony offered by plaintiff, to which action of the Court defendant at the time and in each instance objected and excepted.

Sixth. Because of error of the Court in giving to the jury instructions numbers 1, 2, 3, 4, 5, and 6, and each of them,

36 and to the giving of each of said instructions the defendant at the time and in each instance objected and excepted.

WORTHINGTON, COCHRAN & BROWNING,
Attorneys for Defendant.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 3rd day of July, 1914, the following order was made:

SARAH DWYER, Adm'r'x, Plaintiff,

vs.

CHESAPEAKE & OHIO RAILWAY Co., Defendant.

The defendant this day called up their motion for a new trial herein and the Court having considered of same and being sufficiently advised adjudges that said motion be overruled to which the defendants excepted and prayed an appeal to the Court of Appeals which is granted.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 3rd day of July 1914, the following order was made:

37 SARAH DWYER, Adm'r'x, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RY. Co., Defendant.

Upon motion of the defendants time is given it to and including the 6th day of the next September term of this Court to tender and file its bill of exceptions herein.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky on the 11th day of September, 1914, the following order was made:

SARAH DWYER, Adm'r'x, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY Co., Defendant.

On motion of defendant it is ordered that time be extended and that defendant be and is given until and including the 11th day of the present term of this Court to file its bill of exceptions herein.

At a Circuit Court began and held for Boyd County, at the Court House in Catlettsburg, Kentucky, on the 17th day of September, 1914, the following order was made:

38 SARAH DWYER, Adm'r'x, &c., Plaintiff,
vs.
CHESAPEAKE & OHIO RY. Co., Defendant.

The Defendant this day produced and tendered its bill of exceptions herein, duly signed, sealed, and approved by the court, which is filed, and same is ordered to be and is hereby made a part of the record of this cause without being spread at length upon the order book.

Boyd Circuit Court.

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Be it remembered that on the 24th day of June, 1914, upon the calling of this cause for trial the same was submitted and trial thereof had and upon the trial the following evidence, steps and proceedings and objections thereto were taken and had as follows:

First the plaintiff, SARAH DWYER—introduced as a witness in her behalf, herself, who being first duly sworn, testified as follows, to-wit:

Direct examination:

39 Q. 1. Your name is Sarah Dwyer?
A. Yes, sir.
Q. 2. Where do you live?
A. I live on Greenup, between 20th and 21st.
Q. 3. In Ashland, Kentucky?
A. Yes, sir.
Q. 4. How long have you lived there?
A. About seven or eight years.
Q. 5. Are you the Widow of Richard Dwyer?
A. Yes, sir.
Q. 6. When did he die?
A. Died May, 10th, 1912.
27. 1912, was it?
A. Well, it has been four years——
Q. 8. 1910?
A. Yes, sir.
Q. 9. May 10th, 1910, is that the correct date?
A. Yes, sir.
Q. 10. Where was he killed?
A. At the place called England Hill.
Q. 11. Was his body brought to Ashland?
A. Yes, sir.
Q. 12. At what time of the day or night?
A. It was brought about 4 o'clock in the morning, the next morning.
Q. 13. Was he dead at the time he was brought to Ashland?
A. Yes, sir.
Q. 14. At the time of his death, what was his occupation?
A. He was an engineer.
Q. 15. For what company?
A. Chesapeake & Ohio Railway Company.
40 Q. 16. And where was his run-
A. Well, it was up Big Sandy, but I don't know, from Russell, I don't think he had a steady run——
Q. 17. His run was from Russell up the Big Sandy Division of the Chesapeake & Ohio Railway?
A. Yes, sir.
Q. 18. How long had he been running an engine at the time he was killed?
A. Two years, about.
Q. 19. Prior to that what was his occupation?
A. He was a fireman.
Q. 20. In whose employment?
A. The same road.
Q. 21. At the time of his death what was he earning as an engineer?

A. He made from $150.00 to $160.00 and $165.00 when he got in extra time.

Q. 22. You mean he was earning that running as an engineer, $150.00 for how much time? He made that much or more, how about that?

A. He made $160.00 and $165.00 and he had made $170.00-

Q. 23. As much as $170.00 per month?

A. Yes, sir.

Q. 24. At the time of his death did he own any property?

A. Yes, sir, we was paying for a home.

Q. 25. Where?

A. Where I am living now, between 20th and 21st. on
41 Greenup.

Q. 26. How much had you paid on it?

A. About six or seven hundred dollars, between six and seven hundred dollars.

Q. 27. Did he own any other real estate at the time of his death?

A. No, sir.

Q. 28. Have any personal property other than his personal effects?

A. No, sir.

Q. 29. Wearing apparel, and so forth?

A. No, sir.

Q. 30. Did you at the time of his death have any property in your own right?

A. No, sir.

Q. 31. To what extent, if any, were you dependent upon him and his earnings for your livelihood at the time he was killed?

A. Well, I depended on him all together. I didn't have any thing except what he made by his work, his wages.

Q. 32. What did he do with his wages?

A. He brought them to me.

Q. 33. Who kept up the expenses of the house-hold?

A. He always brought his money to me and I paid my bills.

Q. 34. Did he have any personal habits, by which he used any part of his earnings other than ordinary expenses?

A. No, sir.

Q. 35. What was his habits as to sobriety?

A. It was all right, he was a sober, good worker, and always provided well for me.

42 Q. 36. How many children did you have?

A. Two.

Q. 37. Had they been raised by Mr. Dwyer up to manhood and womanhood?

A. Yes, sir.

Q. 38. Were they schooled by Mr. Dwyer?

A. Yes, sir.

Q. 39. Were they married at the time of his death?

A. My daughter was.

Q. 40. Where was your son at the time of his death?

A. He was at home at the time his father was killed.

Q. 41. Was he able to take care of himself?
A. Yes, sir.
Q. 42. He was not dependent upon your husband for his living?
A. No, sir.
Q. 43. How old was Mr. Dwyer at the time of his death?
A. 45.
Q. 44. What was the condition of his health?
A. Good.
Q. 45. Was he able to work regularly and steady?
A. Yes, sir.
Q. 46. About what was his weight?
A. About 148.
Q. 47. And what was your age at the time of his death?
A. I was 43.
Q. 48. Had you any means, or source of income or revenue, from any source at the time of his death, other than his earnings?
43 A. No, sir.
Q. 49. Any one contribute to your support in any way except your husband?
A. No, sir.

Cross-examination:

Q. 1. You mean that your husband would turn all his wages over to you?
A. Yes, sir, he generally had board to pay up Big Sandy and he paid that and brought the rest to me.
Q. 2. Paid his board up — Big Sandy?
A. Yes, sir, he had to get meals when he was out.
Q. 3. He paid those expenses out of his salary?
A. Yes, sir.
Q. 4. And he turned all the money he received over to you except what he paid for board up — Big Sandy?
A. Yes, sir.
Q. 5. Who constituted your family—how many in your family?
A. Three of us.
Q. 6. He turned over to you sufficient money to take care of the expenses of the household?
A. Yes, sir.
Q. 7. He did that up until the time of his death?
A. Yes, sir.
Q. 8. Had he ever been sick?
A. No, sir, he never was sick that I can remember of. He was hurt once in a wreck, never was sick.
Q. 9. When was that?
A. I don't know how long ago it was.
Q. 10. Tell the circumstances?
A. I don't know, the engine turned over and he was hurt.
Q. 11. That — after you were married?
A. Yes, sir.
44 Q. 12. Can you tell just what injuries he received?
A. Well, he was scalded—he was burned about as bad as he could be.

Q. 13. Was he laid up for any considerable period of time?
A. Yes, sir.
Q. 14. How long?
A. Seven or eight months, maybe a little longer.
Q. 15. Do you remember—give us as near as you can when that was?
A. No, sir, I don't.
Q. 16. How long was he with the road?
A. I guess about seven years.
Q. 17. These injuries were received during that time while he was on the road?
A. Yes, sir.
Q. 18. How long was he fireman?
A. He was fireman for about four years.
Q. 19. And he was engineer for about three years.
A. Yes, sir.

Redirect examination:

Q. 1. Had he recovered entirely from these injuries?
A. Yes, sir. Yes, he had been working a long time.
Q. 2. Any effect from these injuries after he went back to work?
A. No, sir.

The witness, EMMA COMPTON, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. What is your name?
A. Emma Compton.
Q. 2. Where do you live?
A. Live at England Hill.
Q. 3. How long have you lived at England Hill?
A. About 11 years.
Q. 4. About how near to what is known as the England Hill cut?
A. I live right there in the cut, 30 or 40 feet out from the cut from the track.
Q. 5. Which side of the track do you live on?
A. Left hand side, going up.
Q. 6. Between the railroad track and the river?
A. Yes, sir.
Q. 7. At the time of the derailment of the train there, did you see it?
A No, sir, we was all in bed when it happened.
Q. 8. About what time was it?
A. It was about half past one by our time.
Q. 9. What did they do with the man that was hurt there, Mr. Dwyer?
A. They brought him in our house.
Q. 10. Did you go over and see where the train was derailed?

A. Never until the next morning, could see the fire, but I never went out on the track.

Q. 11. Did you see Mr. Dwyer that night?

A. Yes, sir.

Q. 12. Where was he?

A. He was at my house.

Q. 13. How did he come?

A. They carried him.

Q. 14. You know who picked him up and carried him over there?

A. Mr. Schump and Mr. Diamond and some railroad men, I don't know just who they were.

Q. 15. And he stayed there until he was taken away on
46 the train?

A. Yes, sir.

Q. 16. Did you see the rock and dirt on the track?

A. Yes.

Q. 17. You were not out there at the wreck that night?

A. Yes, sir.

Q. 18. What was the matter with him as he appeared, when brought to your home?

A. Well, I don't know exactly, how he was injured, had a skinned place on his head and he had *hemmorrphages* from his lungs, they laid him on the floor on a quilt and he just laid there——

Q. 19. Did you pass up and down the railroad track through that cut before this derailment occurred?

A. Yes, sir.

Q. 20. Did the derailment occur above or below your house?

A. It was just a little above.

Q. 21. A little above?

A. Yes, sir.

Q. 22. Did you notice the nature of the material in that cut?

A. Yes, sir.

Q. 23. What kind of a cut was it, a slippery cut or not?

A. A slippery cut, I always call them.

Q. 24. What did it have in it?

A. Small rocks and dirt, and it would be slipping in——

Q. 25. Every know of the track along there being cleaned up——

A. Yes, sir, often—the work hands would come along and dig it out of the ditch——

Q. 26. You had seen them dig out the ditch there?

A. Yes, sir.

Q. 17. Who was it did that?

A. The section foreman and his hands.

Q. 18. Did you see that big rock before it fell?

A. All along, I can't say just now when I saw these rocks in the ditch, there was a few small ones——

47 Q. 19. And the section men would remove it, the dirt and rocks that fell?

A. Yes, sir.

Q. 20. Do you remember any thing about a rock and some dirt slipping in there and on the track? Some time before this derailment?

A. Not to amount to any thing, only on Mr. George Arthur's Section when he was section foreman, a rock fell on the railroad track then.

Q. 21. Who removed that rock?

A. Mr. Blankenship and my husband.

Q. 22. Who was Mr. Arthur working for at that time?

A. He was the section foreman.

Q. 23. Where was it?

A. It was just below where this big one came in.

Q. 24. Where was it, on the railroad track?

A. Yes.

Q. 25. What did they do with it? How did they remove it?

A. They broke it with a pick and took it off.

Q. 26. About how long before this derailment did that happen Mrs. Compton?

A. Yes, this was in August, some time before this, about a year and six months before this.

Q. 27. Now what was it that caused that derailment there?

A. Why, there was a big rock sticking out that come down and dirt and other rocks, they came out and that caused it.

Q. 28. Did you see the big rock on the track?

A. No, sir, I didn't. Saw the man there next morning working. I didn't see it until after they had rolled it out on the bank.

Q. 29. Where did they leave it?

A. Left it right opposite to our house.

48 Q. 30. Between the river and the railroad track?

A. Yes, sir.

Q. 31. On the left hand side going up?

A. Yes, sir.

Q. 32. And who was it that did that?

A. It was the wreck train of the railroad Company.

Q. 33. Now before you saw the rock and material being removed that morning had you ever seen the track itself being cleaned of dirt and rocks off of it, before this?

A. A good deal, yes.

Q. 34. Now you had seen where this rock hung in the cut before this, hadn't you?

A. Of course—I didn't examine that rock—I could see it in among the dirt and other stuff there——

Q. 35. After the derailment did you notice the side of the cut where the rock had been?

A. Yes, sir.

Q. 36. How long had it been there—is the rock in the cut there, that you noticed that fell?

A. Yes, sir.

Q. 37. How much had it changed, or moved since you had been there?

A. Of course,—I didn't inspect that rock. I could see it there in the cut as I would pass by.

Q. 38. How did it look, was it solid all through?

A. Why on the upper side of the rock there was a place broke and open and dirt behind the rock——

Q. 39. On which side?

A. On the upper side.

Q. 40. About what size was the rock?

A. About ten feet long and six feet wide.

Q. 41. What position was it laying in the cut?

A. It was laying so that it partly showed, say here was the rock and part of it showed, I can't tell exactly, it was laying in the
49 slope of the cut——

Q. 42. Could you tell that the rock was changing its position any?

A. Yes, these rocks and dirt kept coming down.

Q. 43. *Saw* whether or not this rock looked like it was changing its position, was moving—or sliding away from the cut?

A. It looked like it was gradually coming down, giving away—could see it and it looked like it was.

Q. 44. How much of the length of the rock could you see before it fell?

A. About five feet.

Q. 45. Then you saw about half way of the rock?

A. Yes, sir.

Cross-examination:

Q. 1. As I understand it you live between the track of the Chesapeake & Ohio Railway Company, and the Big Sandy River?

A. Yes, sir.

Q. 2. How far from the track?

A. About 30 feet.

Q. 3. Just across the England Cut?

A. Yes, sir.

Q. 4. That is where the wreck occurred, wasn't it, in that England Hill cut?

A. Yes, sir.

Q. 5. That is a rocky hill side?

A. Yes, sir.

Q. 6. Rocky bluff?

A. Yes, sir.

Q. 7. These rocks that are in that bluff, do they extend back into the side of the hill—back into the hill?

50 A. Well, you can see them, you can't tell just how far they extend back into the hill——

Q. 8. How long do you think this rock was?

A. 10 feet, that you could see.

Q. 9. Where did you see the rock?

A. I seen it right there by our house.

Q. 10. What size in your judgment was it?

A. Ten feet.

Q. 11. Ten feet long?
A. Yes, sir.
Q. 12. How wide?
A. About six feet.
Q. 13. How thick?
A. About two feet.
Q. 14. About two feet thick?
A. Yes, sir.
Q. 15. Now how much of that rock did you see, that was on the side next to the rail?
A. You could only see about that much of it,—(indicating)
Q. 16. Could you see the thickness of it?
A. Yes, sir.
Q. 17. Thickness on the side of the bluff?
A. Yes, sir.
Q. 18. Did you see the thickness of the rock, length wise 10 feet, or the short wise, 6 feet?
A. Why, you could only see a little bit of it until it came down.
Q. 19. How much could you see?
A. I could see the depth of it, couldn't see it in length——
Q. 20. As I understand it you saw the thickness of the rock where it projected out of the side of the bluff and you say that rock was two feet thick?
51 A. Of course I didn't measure it then, I don't know how much it was.
Q. 21. Whether you measured it or not it was the face of the thickness that you saw?
A. Yes, sir.
Q. 22. And it extended back into the bluff how far?
A. I don't know how far it extended—how far it went.
Q. 23. Did it go back into the bluff any?
A. Yes, sir.
Q. 24. You could see the face of that rock—two feet of it, thick, but you don't know how far it extended back into the bluff?
A. I don't know how thick it was before——
Q. 25. Underneath that rock was ledges of slate rock?
A. Yes, sir.
Q. 26. Solid almost from the ground?
A. They worked out gradually——
Q. 27. Solid slate foundation from the bottom of the cut up to where this rock laid?
A. I don't know slate or not. Small rocks in the side of the hill and they kept falling down in the ditch——
Q. 28. And when they would fall down in the ditch the section men would come along and clean the rocks and dirt out of the ditch?
A. Yes, sir.
Q. 29. You have seen them working there?
A. Sure, when I passed them.

Q. 30. It is frequently the case in a cut of the character that you speak of this one being that rocks are known to fall?

A. Yes, sir.

Q. 31. You say that some time before this rock fell another rock had fallen there in that cut, when was that?

52 A. Yes, sir, it was in—I judge—It was when Mr. George Arthur had charge of the section.

Q. 32. What time was that?

A. I don't know only it was during the time when George Arthur had charge of the section there.

Q. 33. George Arthur preceded Barney Wells as section foreman there?

A. Yes, sir.

Q. 34. Did you know that the rock extended back into the *bluff* except that you know that it extended back to the bluff?

A. No, sir, I can't say that it extended back into the cliff, it was covered.

Q. 35. It was covered with dirt, and didn't you notice it to be that way?

A. I guess it was.

Q. 36. It looked like it was—back in the rocks—in the bluff, like any other rock there?

A. Yes, sir.

Q. 37. Did you see the entire length of that large rock, or just the width of it?

A. Yes, sir, saw the width of it, and of course you could see a small portion of it.

Q. 38. Didn't you *saw* this rock was 10 feet long and six feet wide, didn't the rock extend this way (indicating) ten feet?

A. I don't know.

Q. 39. Which way was it turned?

A. I don't know, looked like it was kinda out at the other corner, of course I couldn't tell how far it went back into the hill.

Q. 40. You never noticed the crack that you have mentioned until after the rock had fallen out?

A. Yes, sir. Why, yes, sir. The crack was there some time

53 before the rock fell, on the upper side.

Q. 41. You testified in this case before, didn't you?

A. Yes.

Q. 42. At that time wasn't you asked on cross-examination about that crack in the hill, this question: "55. Now that crack was in bluff, the side of the bluff there?" and did you not make this answer: "A. Yes, sir." "Q. 56. And up at the place where this big rock and dirt fell? A. Yes, sir."

A. You mean after the rock fell?

Q. 43. Yes.

A. Well, there was a crack there, of course. Take a rock that big out of there——

Q. 44. A crack where?

A. Where the rock fell.

Q. 45. Is that the crack you testified about on the other trial?

A. No, sir. The other crack——

Q. 46. And was not these questions asked you and did you not make these answers on the other trial? "Q. 56. And you noticed this crack after this happened? A. Yes, sir. Q. 58. Was that the first time you had noticed that crack there—— A. Yes, sir." Didn't you testify that way on the other trial?

A. That is all you asked me about——

Q. 47. Do you now recall of having testified that way before and is it correct?

A. No, sir. You asked me to described about how the rock laid and of course I described it as best I could——

Q. 48. I am not asking you about your direct-examination—I asked you if you didn't mention before that the crack was in the side of the bluff? Did the crack extend into the side of it or not?

54 A. I seen the rock there after the regular force and the extra force had took it out of the way——

Q. 49. You recollect now of seeing two cracks, one before and one after?

A. Well, I don't suppose he was asking about the other.

Q. 50. *You* crack that you could see before the rock fell, was up and down?

A. Yes, sir.

Q. 51. And parallel between this large rock and other rocks?

A. Well, I don't know about the other rocks.

Q. 52. And one that was back in the side of the hill?

A. Yes, sir.

Redirect examination:

Q. 1. About what was the character of that crack, four or five or six inches long?

A. No, sir.

Q. 2. Could you see it from the railroad track?

A. No, sir, you can't see it all coming down, can't see all of it.

Recross-examination:

Q. 1. Now to stand and look at the hill side these rocks and the general appearance of the cliff is all about the same, the rocks just extend back horizontally into the hill?

A. I can't tell you just how it was, I know the general appearance of the side of the hill all about the same—there was a large rock and it came out of there——

Q. 2. You don't know what proportion of the rock you saw, either of its width or length?

55 A. Of course, I saw the width, but I wouldn't say that I saw it all, it was covered with dirt on one side of the cut——

Q. 3. How far did that rock project—out from the hill side?

A. Came out that way, kinda out in a point, where the big rock was——

Q. 4. You know how many feet or inches of it, you could see?

A. The place, where the end part of it was, could see about two feet.

The witness, JOE COMPTON, being first duly sworn, testified as follows, to-wit:

Redirect examination:

Q. 1. Where do you live.
A. I live up Sandy here, at England Hill.
Q. 2. England Hill cut?
A. Yes, sir.
Q. 3. And you are the husband of Mrs. Emma Compton, who just testified?
A. Yes, sir.
Q. 4. And you have lived at the place she spoke of, how long?
A. Well, I don't remember just how long.
Q. 5. You remember the occasion when a freight train of the Chesapeake & Ohio Railway Company was derailed up there?
A. Well, I wasn't at home at night, just that night.
Q. 6. You remember the fact that it occurred?
A. Yes, sir.
Q. 7. Up to that time how long had you been living there?
A. Well, I can't say just how long.
56 Q. 8. About, your best judgment?
A. I had lived there, I *except* ten or twelve years, some where like that.
Q. 9. You say you wasn't at home the night the derailment occurred?
A. No, sir, I wasn't there.
Q. 10. How long after the accident before you got up there?
A. Well, it was a week or so, I guess.
Q. 11. A week or more?
A. Yes, sir.
Q. 12. Were you familiar with the place where the derailment happened?
A. Yes, sir.
Q. 13. What kind of material was in that cut?
A. Well, sir, it looks like a slaty kind of rock, loose layers and some hard rock mixed, through—some of the rocks stick out of the hill, and are liable to fall——
Q. 14. Before this had any rocks fallen down out of the cut there?
A. Yes, sir.
Q. 15. How long before?
A. Something like a month before.
Q. 16. What became of the rocks on the track at that time?
A. I went out myself and rolled them off of the track.
Q. 17. Where did you roll them to?
A. Rolled them off to the side of the track.
Q. 18. You removed several of them?

A. Yes, sir.

Q. 19. Any body ever help you move any rocks off of the track there in the cut?

A. They did, once.

57 Q. 20. Who helped you?

A. Pete Blankenship. I went and told George Arthur about it and he sent one of his men with me to help get it off.

Q. 21. Blankenship assisted you to remove the rock?

A. Yes, sir.

Q. 22. The other you got off by yourself?

A. Yes, sir.

Q. 23. Why did you do that?

A. I just didn't want to see a train wrecked or some thing like that, so I rolled the rock off of the track——

Q. 24. Did the section foreman and the section men know of the falling of the dirt and rocks in there in that cut, from that slope?

A. Indeed, I don't know if he did or not.

Q. 25. Ever say anything to the section foreman at that time about it?

A. No, sir, only George Arthur, he was section foreman, when I rolled the stone off and the one I told about it.

Q. 26. George Arthur was the section foreman at that time?

A. Yes, sir.

Q. 27. Did the railroad Company ever pay you for removing rocks and dirt from the cut?

A. One time, when Mr. Blankenship helped me, broke the rock up and rolled it off, they paid me for that.

Q. 28. How high is the cut?

A. 15 or 20 feet in the highest places.

Q. 29. Had your attention ever been drawn before this derailment to that cut and the rocks that were in that cut?

A. Yes, sir.

Q. 30. What drew your attention—You saw the rock that fell before it fell?

A. Yes, sir, the rock came loose from the rock bank, the dirt and stuff kept pushing behind it and it gradually washed down behind it and kept pushing it down all the time.

58 Q. 31. Any thing indicate to you that it was loose?

A. Yes, sir.

Q. 32. What indicated to you it was loose?

By the Court: Just describe it. The Condition there.

A. It was a hard flat rock, two feet thick, and about four or five feet wide and about ten feet long, wider on the bottom, and every time there was a bad wash it would wash stuff down in behind there and keep it pushed out——

Q. 33. Did it slip *on more* any from the time you first noticed it until the derailment?

A. Yes, sir.

Q. 34. About how much had it moved during the time you had lived there and had observed it?

A. I don't know how much it did move——

Q. 35. For how long had you noticed, if you had of the rock not being in the hill?

A. Some three or four weeks.

Q. 36. And may be longer?

A. Yes, sir, I couldn't tell you exactly what time.

Q. 37. That one of a chain of rocks, *on* still above the railroad track?

A. I don't know, there was some three or four slabs left—didn't clear the track, from which it could have split——

Q. 38. When you first noticed it after it fell it was moved, I suppose?

A. Yes, sir.

Q. 39. How far from the railroad ties, did they have this slope?

A. Well, there was four or five feet may be. Just giving it as a guess, never measured it.

59 Cross-examination:

Q. 1. When was it that you first noticed the rock was loose or insecure?

A. Some three or four weeks before the accident

Q. 2. It had been that long a time before the accident that you first noticed the rock was loose?

A. Yes, sir.

Q. 3. Had you ever noticed the rock before that, and if so for how long?

A. Noticed it, prior to that time. Yes, for six months or a right smart while.

Q. 4. How much do you think it had come down, moved, during that time.

A. Well, I don't know exactly how far. Just the wash, coming in behind it.

Q. 5. How much did you notice it slipping?

A. I expect 2 or 3 feet.

Q. 6. You noticed it moving that far?

A. Yes, sir.

Q. 7. You testified before in this case?

A. Yes, sir.

Q. 8. Didn't you testify before as follows: "Q. 34. How was it down next to the bottom, solid, wasn't it? A. When it would be wet, it would be slipping, you could tell *you* that?" Was that question asked you and did you make that answer?

A. I suppose it was.

Q. 9. And was this question asked you, "Q. 35. You think this rock had come out four or five inches? A. Yes, sir." And this question, "Q. 38. This rock had slipped out toward the track, four or five inches, that it? A. Yes, sir." Did you say

60 that?

A. I suppose so.

Q. 10. Why do you say now that it moved two or three feet?

A. I guess, I said after it come out of the hill.

Q. 11. What did you mean by saying before that it had moved four or five inches?

A. Four or five inches down the slope—four or five inches down the rocky hillside——

Q. 12. And rolled down the slope, two or three feet from where it came out of the main bank?—did it roll out of the track three or four feet?

A. Didn't get quite to the track at that time.

Q. 13. Will you explain why you said before that the rock slipped four or five inches from the time you first noticed it, and now you say it slipped two or three feet?

A. Where it came out at the main bank—I had noticed it, five or six feet pushed out——

Q. 14. What did you mean on the last trial when you said four or five inches?

A. I meant to say where it fell out of the bank, where it became loose and fell out, I noticed where it had moved out four or five inches.

Q. 15. How long before this train was derailed had you noticed that?

A. A great while.

Q. 16. Just give us your best independent recollection?

A A month or two.

Q. 17. A month or two?

A. Yes, four or five inches, it was about a month.

Q. 18. And later on you say it was two feet?

A. Yes, at the time the rock fell out of the bank, it was.

Q. 19. These rocks all extended horizontally back into that bluff, didn't they?

61 A. No sir, the- laid flatways in the side of the hill.

Q. 20. Did this one that fell lay and extend clear back into the hill?

A. No, this one didn't.

Q. 21. This was laid out?

A. Yes, sir.

Q. 22. Wasn't the whole rock exposed?

A. No, not all.

Q. 23. How much of it was exposed?

A. Five or six feet.

Q. 24. Five or six feet of it exposed?

A. Yes, sir.

Q. 25. That is a pretty steep bluff, ain't it?

A. Yes, sir.

Q. 26. It is almost perpendicular, straight up and down?

A. No, not perpendicular.

By the Court: What first attracted your attention to this rock?

A. Well, I saw it was coming out, sliding down from the side of the hill, and I just kept noticing it then to see how much it had slipped down.

Q. 27. That is what first attracted your attention?

A. Yes, sir.

Q. 28. How long was that before it fell?
A. Two or three months or maybe longer.
Q. 29. Two or three months?
A. Yes, sir.

Redirect examination:

Q. 1. This rock was loose from the rest of the bank?
A. Yes, sir.

Recross-examination:

62 Q. 1. Did you ever testify before that you saw that that rock had slipped two or three feet at any time? I will ask you if on the first trial of this case, you did not testify, about that rock slipping two or three feet?
A. Not that I recollect of.

Re-redirect examination:

Q. 1. Were you not also asked on the other trial as to how far the rock stood out from the rest of the bank there and you said five or six inches?
A. Yes, sir.
Q. 2. And was that true?
A. Yes, sir.
Q. 3. And you answered all that you were asked about?
A. Yes, sir.

Re-recross-examination:

Q. 1. You said it had slipped four or five inches, on one side?
A. I said it had slipped out some four or five inches, giving down then.
Q. 2. You never have testified about it giving down or slipping to the extent of two or three feet, this is the first time you have ever testified to that?
A. I don't recollect.
Q. 3. You don't recollect of ever having testified to anything of that kind before?
A. No, sir.

63 The witness, GEORGE STANLEY, being first duly sworn testified as follows, to-wit:

Direct examination:

Q. 1. How old are you?
A. I am about 60, I guess, 60 or 65, I don't know hardly which.
Q. 2. Where do you live?
A. Live on Chadwicks Creek.
Q. 3. How long have you lived on Chadwicks Creek?
A. Near about three years.

Q. 4. At the time the train was wrecked up here on the Big Sandy Division at the England Hill cut, where did you live?

A. Well, just about that time I lived about two or three hundred yards down below where the wreck was, but I didn't never measure it.

Q. 5. Two or three hundred yards below where the wreck was?

A. Yes, sir.

Q. 6. Did you live along the railroad track?

A. I lived on the left hand side as you go up.

Q. 7. Left hand side going up?

A. Yes.

Q. 8. Did you have any occasion to pass through that cut before that wreck?

A. Well, I kept my cow in Shock Richardson's pasture and me and my wife would go backwards and forwards to milk and we would kinda notice that rock.

Q. 9. How often would you go through there?

A. Yes, sir, twice a day——

Q. 10. To milk?

64 A. Yes, sir, go to milk the cow and come back——

Q. 11. You kept the cow in Shock Richardson's pasture?

A. Kept her in Shock's pasture.

Q. 12. And you all would go up there to milk her?

A. Yes, sir.

Q. 13. And you would pass through there twice a day, every day?

A. Yes, sir.

Q. 14. How long had you been going through there when that accident happened?

A. Well, we had been going through there a couple of years, *two* pastures.

Q. 15. During that time and before this derailment did you notice any loose rock, that might fall out?

A. I would notice it every time I passed.

Q. 16. You noticed that every time you passed?

A. Yes, sir.

Q. 17. What did you notice about this rock that fell, if any thing?

A. It was dropping all the time, the dirt washed down and my wife would run a past that rock.

Q. 18. Why?

A. She was afraid of it.

Q. 19. What was there about it, if any thing that made it look dangerous?

A. Well, the rock sit up in that position and loose underneath, looked like you could take a hand spike and push it off.

Q. 20. Was it attached to, or loose from the rest of the hill there?

A. Well, it looked to me like it was pushed loose from the main cliff.

Q. 21. Pushed loose from the main cliff?

A. Yes, sir, kinda shrunk down from the main cliff.

65 Q. 22. What became of that rock?

A. I don't know, I never measured it, or nothing of the sort.

Q. 23. What became of it?
A. It is laying over on the left of the railroad.
Q. 24. As you go up?
A. Yes, sir.
Q. 25. Between the railroad and the river?
A. Yes, sir, right before Joe Compton's door.
Q. 26. Who put it there?
A. These here railroad men, I reckon—can't tell who put it there—they lifted it with the wrecker——
Q. 27. The wreck train lifted it off?
A. Yes, sir.
Q. 28. Where did they lift it from?
A. Lifted it off of the railroad.
Q. 29. When was it?
A. I couldn't tell you right exactly when it was.
Q. 30. How long after the accident was it that they lifted this rock off of the track?
A. Oh, they lifted it off, I think, that evening, I ain't right certain that they lifted it off that same evening, but I know it was right at once.
Q. 31. Do you know what time the train was wrecked?
A. No, I don't know exactly what time it wrecked, I went up there just a short while after it wrecked and they had taken the man over to Joe Compton's.
Q. 32. And that before the wreck train came?
A. I can't tell you exactly when the wreck train came, but it come.
Q. 33. Did you see the rock there
A. Yes, sir.
Q. 34. Where was it then?
A. Well, it had kinda slid over, up on the railroad.
66 Q. 35. On the track?
A. On the track.
Q. 36. And where did you next see it?
A. I stood right there, sir, until they lifted it off with the wrecker.
Q. 37. And they laid it on the left hand side?
A. Laid it on the left hand side as you come up.
Q. 38. Did you see the engine there that was wrecked?
A. Yes, sir.
Q. 39. What wrecked it?
A. Well, I couldn't tell you, if that rock didn't wreck it I couldn't tell you what wrecked it.
Q. 40. Had it hit the rock?
A. I suppose it had.
Q. 41. Knock the engine over against the rock, or on it?
A. No, it was kinda leant over.
Q. 42. Laid over against the rock?
A. Yes, I couldn't tell if the train was wrecked on the rock or not, I suppose it was through.
Q. 43. Was that the same rock that you had seen in the cut there, that you speak of?
A. Yes, sir, same rock.

Q. 44. How long did you n tice that rock there loose?
A. About a couple of years.
Q. 45. As much as two years
A. Yes, sir.
Q. 46. Had it changed any in position during that time?
A. Well, I don't know as it had, but it looked to me like a big crack all the time, the dirt had washed in and it was pressed out, and in a very wet time it would be filled with dirt there and stuff from the rock, and it looked dangerous.

67 Q. 47. Some times the dirt would wash over it and some times it would be washed off of it?

A. Yes, sir.
Q. 48. Was there space between it and the main body of the hill.
A. Well, if there was I couldn't see it.
Q. 49. You spoke about it being prized loose?
A. It was prized loose, I could get a hand spike behind it——
Q. 50. You mean a crack was in it?
A. Yes, sir, a crack.

Cross-examination:

Q. 1. You spoke about during wet spells dirt falling down, that was all along the side if the bluff, wasn't it?
A. Certainly, I have seen rocks slide off in the cut——
Q. 2. They would fall in the ditch there, and you have seen the ditch cleaned out?
A. Yes, sir.
Q. 3. That was an often occurrence all along the whole side of the bluff?
A. Yes, sir.
Q. 4. It will come in, in bunches?
A. Yes, sir, more so when you tend up above the cut, it will be washed more.
Q. 5. Now you say there was a place there that it looked like you could put a hand spike in?
A. Yes, sir.
Q. 6. That was in between this rock and another rock next to it?
A. Yes, sir.
Q. 7. A crack up and down on the side of the cliff?
A. It was up this way, here stood the main cliff and here stood a rock (Indicating) and it looked to me like you could put a hand spike in there and prize that rock off.

68 Q. 8. Take this side of the table as the side of the Cliff, the rock laid in this way? (Indicating.)

A. Yes, sir.
Q. 9. Crack between this rock and the one next to it?
A. No, sir, crack run lengthwise.
Q. 10. On top of the rock?
A. No, right in the middle of it, when that rock fell it left the face of the cliff here—another rock——

Q. 11. The crack that you are talking about was in the middle of the big rock—the crack?

A. This rock that fell off, connected by the crack—after it fell off——

Q. 12. The crack that you speak of, you told me extended up and down the side of the cliff, didn't you?

A. No, sir, I never did.

Q. 13. Which was did it extend?

A. Lengthwise, up and down this way (indicating) here is the cliff and here stands the rock, this end, the upper end was sprung out about far enough it looked like to me to get a hand spike in there.

Q. 14. The way you placed your hands, here was the side the crack was on and here was the rock here?

A. No, sir.

Q. 15. That is the way you have got your hands?

A. No, sir. My hands are correct—this hand is where the upper end of the rock, and it was about four or five inches, looked to me like far enough to get a hand spike in there and prize it down.

Q. 16. You remember about it being out four or five inches?

A. Yes, the part next to the railroad.

Q. 17. The whole rock was out that way?

A. The bottom of it was on slate, but I suppose it kept on
69 cutting, and the stuff coming down here, kept on pushing the rock out——

Q. 18. What kind of material did it rest on?

A. On slate, or some kind of a soap stone.

Q. 19. And extended back into the side of the cliff?

A. It run down, you couldn't see the end of it.

Q. 20. Where?

A. The lower end.

Q. 21. Where was it?

A. It was "agin" the hill.

Q. 22. If it was against the hill you could see it, couldn't you?

A. I don't suppose you could.

Q. 23. What do you know about it?

A. I suppose, there was a little dirt on the lower end of it.

Q. 24. Could you tell how large the rock was when it extended back into the hill?

A. Well, I know from what I could see of it, I could see it on the outside, up and down, I could see about five or six feet as near as I can get at it.

Q. 25. You could see five or six feet of that rock?

A. Yes, sir, but I couldn't see underneath, or I couldn't see through the crack.

Q. 26. How far did that rock project out from the side of the hill?

A. Well, it slanted out about three or four inches——

Q. 27. Three or four inches, out of the side of the hill.

A. One end of it——

Q. 28. One end was out three or four inches?

A. Yes, sir.

Q. 29. What about the balance of it?

A. The balance was sitting on soap stone and a little
70 dirt down at the lower end of it was exposed.

Q. 30. What was on top of the balance?

A. Dirt and stuff that had washed down.

Q. 31. How far up from the level of the track was that rock in the hill?

A. It was five or six feet, I reckon, I never measured it.

Q. 32. Four or five feet?

A. Five or six feet, I never measured it, only just guessing.

Q. 33. How long was that rock?

A. Well, sir, I never measured it, never went around it.

Q. 34. You saw it?

A. I never measured it, I seen it.

Q. 35. What is your judgment about it?

A. I suppose the rock was close to ten feet long.

Q. 36. How wide was it?

A. About five or six feet wide, or seven.

Q. 37. How thick?

A. Well, I don't know really, I never measured the rock.

Q. 38. Give me your judgment about the thickness of the rock?

A. I guess about two feet thick, or a little over.

Q. 39. Now that was the thickness of the rock that projected out, wasn't it?

A. Yes, sir.

Q. 40. The thick part of it?

A. Yes, sir, it stood upon its edge.

Q. 41. What do you mean by sitting up on its edge?

A. Well, you have seen a sliver of rock, split off of a rock, and the jury can get an idea how that is.

Q. 42. I want you to give us an idea how that is——

A. I don't know, there was some there that didn't fall.

Q. 43. What kept them from falling?

A. I couldn't tell you, only it was a soap stone cut—it kept it from falling——

71 Q. 44. How far from the outside edge of the soap stone out to the projection of the rock?

A. I never paid enough attention to that.

Q. 45. Four or five inches?

A. I told the old woman if I had a hand spike I could stick in there and prize it out, and prize it down—If I had one, I would prize it down, and she says if you do some one will get killed——

Q. 46. You and your wife walked by it all the time?

A. No, sir, she run by it.

Q. 47. How would she go?

A. She would get on the far side of the track and would run by it.

Q. 48. Now in order to get the thing in my mind, get your testimony correct about it,—I just want to repeat the question again—I want to know just as near as you can give it, how much of the rock—the actual rock you could see?

A. Underneath?

Q. 49. The whole rock? How much of the whole rock?

A. Well, sir, I don't know exactly,—if I should die, I couldn't tell you.

Q. 50. In other words, you wouldn't say how much you could see?

A. I don't know as I could. I could make a blunder at it, it is not my desire to tell a lie, I want to tell the truth.

Q. 51. You had noticed the rock for some time prior to the night the train was derailed?

A. Yes, sir.

Q. 52. Ever notice any change in the position of the rock during that time?

A. Never paid much attention only as we would pass there and me and my wife would notice the rock of course, If I had known I would have been on the witness stand I would have paid a
72 little better attention to it.

Q. 53. As a matter of fact you didn't pay much attention to it?

A. Of course, I was watching "atter" my own family.

Q. 54. You testified before in this case didn't you?

A. Yes, sir.

Q. 55. Didn't you testify then that the crack extended up and down the hill?

A. Up and down, lengthwise, up and down.

Q. 56. Up and down and lengthwise are entirely different?

A. I didn't state the crack was up at the top, I said the crack was up here and the rock was "kind a swagged out.

Q. 57. I will ask you if this question wasn't asked you on your Cross Examination: "Q. 18. Where was that crack did it extend up and down in the cliff" or lengthwise in the cliff and did you not answer: "A. Up and down?"

A. I might have done it, but I have showed the jury and you to-, like this is the cliff and it was up and down here (indicating) at the end, the rock had come out and I could have taken a hand spike and prized it out——

Q. 58. This crack was just an ordinary crack like you see in rocks on the side of the hill, wasn't it?

A. Certainly.

Q. 58. Run up and down?

A. No, sir, it run lengthwise.

Q. 59. Why did you tell me that then?

A. You folks just misunderstood me.

Q. 60. I didn't——

A. Of course they may have misunderstood the way I have given it, but it was lengthwise.

73 Redirect examination:

Q. 1. Lengthwise, you mean up and down the river?

A. Yes, sir.

Q. 2. And the space between the rock and the slope was at the upper end of the rock?

A. At the upper end, yes, sir.
By the Court: Going up the river?
A. Yes, sir.

The witness, JOHN BOYD, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. Where do you live?
A. Live in the 4th. ward now.
Q. 2. Catlettsburg?
A. Yes, sir.
Q. 3. In May, 1910, where did you live?
A. I lived in Ewing District—England Hill District, you might say.
Q. 4. England Hill District?
A. Yes, sir.
Q. 5. Were you farming then?
A. Yes, sir.
Q. 6. Where it that with reference to the England Hill cut, on the C. & O.? Did you live above that cut?
A. I lived above it, yes, sir.
Q. 7. How far?
A. About a mile.
74 Q. 8. In going to and from Catlettsburg to your farm up there, did you pass through this cut up there—the England Hill cut?
A. In coming to town, I passed it, of course.
Q. 9. Walking the railroad. Would you walk the railroad, or how?
A. Walked the railroad.
Q. 10. When you would not be hauling some thing?
A. Yes, sir.
Q. 11. You remember the time the train was wrecked up there?
A. Yes, sir.
Q. 12. You remember when that was?
A. In May, I think.
Q. 13. How long ago?
A. 1910, I think it was.
Q. 14. 1910?
A. Yes sir.
Q. 15. How long before that had you been in the habit of going up and down through that cut?
A. I don't know how long I had been in the habit of walking there, up and down the railroad, been traveling it ever since the railroad had been built, been a good while since I first traveled it.
Q. 16. Did you ever notice the nature of the material in that cut?
A. Kind of a loose crumbly rock, looked like.
Q. 17. During that time had you noticed any rock in that cliff that looked different from the others in any way?
A. I noticed a rock in the cliff that looked like it was going to

come down, that was extending out—looked like it had slipped loose from the original rock, some distance, I can't say just how far it had slipped, slipped five or six inches, made a crack there.

Q. 18. Five or six inches from what?

A. That far from the other rocks.

75 Q. 19. It separated and was loose from the other rocks?

A. Yes, sir.

Q. 20. How long had you noticed that rock being there that way before the wreck?

A. I had noticed it several times in passing.

Q. 21. How long had it been since you first noticed it?

A. It wasn't very long before the wreck.

By the Court: About how long?

A. It might have been a week, or more than a week, I can't say for sure, I know I passed the rock all the time.

Q. 22. How did it compare in size with the other rocks in the slope there?

A. Well, I don't know, some rocks smaller—of course some larger than it was.

Q. 23. About what size rock was this that you noticed had become loose and separated from the rest of the slope?

A. Well, the rock that extended out was four or five feet—the side of it that was naked and the end of it stood out from the cut, the nearest end towards town.

Q. 24. There was four or five feet of it exposed?

A. Yes, sir.

Q. 25. And one part of it stood out four or five inches, that right?

A. Yes, sir.

Q. 26. What about the other part of it?

A. The other part was covered up with dirt.

Q. 27. Covered with dirt?

A. Yes, sir.

Q. 28. Which end was covered by dirt?

A. The lower end of it.

Q. 29. The lower end?

A. Yes, sir.

76 Q. 30. Was there any thing about the condition of the rock that indicated to you that it was dangerous, or might fall, other than the distance between it and the rest of the slope?

A. I spoke to some other people that was with me, I don't know just who it was——

By the Court: Don't tell what you told.

Q. 31. Just tell what there was that indicated to you that it was dangerous or liable to fall?

A. I thought the rock might fall is all.

Q. 32. Why did you think so?

A. Because it was loose and slippery, had a foundation of soap stone and stuff on there, several ingredients—and it was over the railroad track, away up there——

Q. 33. The material under it was a slippery sand stone material?
A. Yes, sir.
Q. 34. What became of the rock?
A. I saw that rock later on, on the left hand side of the railroad next to Mr. Compton's house.
Q. 35. Left hand side of the railroad?
A. Yes, sir.
Q. 36. When did you first see it there?
A. I saw it there just a day or so after the wreck.
Q. 37. And did you notice that it had disappeared from the hill top slope?
A. Yes, sir.
Q. 38. How high above the railroad track was this rock in the slope?
A. It might have been five or six feet.
Q. 39. About what size was the rock?
A. I never measured the rock—the rock looked like it might have been eight or ten feet long, and probably a couple of feet thick.
77 By the Court: And how wide?
A. Five or six feet wide.

Cross-examination:

Q. 1. The formation of the side of this cliff where the rock came from was a slatey formation, wasn't it?
A. Yes, sir.
Q. 2. This rock laid on the slate?
A. Yes, sir.
Q. 3. It projected right out from the side of the cliff?
A. Yes, sir.
Q. 4. Laid in the cliff flat ways?
A. Yes, sir.
Q. 5. Which edge of this projected out from the cliff and the other rocks?
A. The upper end of it going down towards Catlettsburg, stood out, the other end was back quartering in the hill.
Q. 6. That was all covered by the portion of the cliff that was on top?
A. Yes, sir.
Q. 7. How far did you say the rock projected out from the side of the cliff?
A. I said it wasn't—along the side of the track you could see four or five feet.
Q. 8. You mean you could see the width of the rock for four or five feet?
A. Yes, sir.
Q. 9. And that projected out from the side of the cliff for four or five inches?
A. I mean the length of it, was down that far—the width of it extended up like this, probably four or five feet——

78 Q. 10. Take the top of this box—this was the length of the rock and this part towards Mr. Malin to be the width and here is a flat surface, here is the cliff, and extending down that way was the slaty formation?

A. Yes, sir.

Q. 11. Above that was rocks and dirt and material of that character?

A. Yes, sir. It extended out four or five inches from the main rocks—the cliff—up and down the hill, another rock behind it, it had slipped away from another rock, and out from it——

Q. 12. And the hill was back of the rock?

A. Yes, sir.

Q. 13. You couldn't see it all?

A. Only a portion of it, a little portion of it.

Q. 14. The way it had separated from the other rocks you didn't think it was safe?

A. A portion of it.

Q. 15. If it had slipped away from another rock, it was the rock that was exposed to view in the side of the cliff, wasn't it?

A. Yes, sir, I suppose so.

Q. 16. The rock was laying along the side of it?

A. Along the side of the hill, didn't lay diagonally in the hill, laid along the side of the hill, in the cut, the rock did.

Q. 17. Which rock was it that laid that way?

A. The one that fell out.

Q. 18. The one that fell out?

A. Laid on the side of the hill. Laying down in the side of the hill, wasn't diagonally in the hill—the end of it.

Q. 19. Which end, the upper end?

79 A. The lower end of it was covered with earth, coming to town.

Q. 20. How much of the rock was exposed?

A. I said four or five feet of the side of it, the edge, I mean.

Q. 21. How far did that stick out from the side of the hill?

A. You mean the whole rock—say here was the rock here, it extended out four or five inches—slipped over towards the railroad, is what I mean—at the end——

Q. 22. You say you could see four or five feet of the thickness of the rock, or the width?

A. The length.

Q. 23. Of the length, how much of the top of the rock could you see, the flat surface?

A. Couldn't see so much of the top, covered with earth.

Q. 24. Give an idea about how much of the top of the rock was exposed?

A. I can't say, never measured it, the upper corner was naked——

Q. 25. Your best judgment?

A. I can't say how much there was.

Q. 26. The top of that rock was 6 feet by ten feet, I believe is the dimensions given by the witnesses, that would be 60 square feet, now how much of that surface could you see?

A. I could see four or five feet of the length of *ti* running down the river.

Q. 27. How much of the top—square feet?

A. The top wasn't naked at all, except a small portion of the upper end.

Q. 28. A small portion at the upper end exposed to the naked eye?

80 A. Yes, sir.

Redirect examination:

Q. 1. Standing down on the railroad track the top of the rock could be above your head, wouldn't it?

A. O, yes, yes, sir.

Q. 2. And you could see four or five feet of it extending along on the side of the slope?

A. Yes, sir.

Q. 3. The lower four or five feet was covered with dirt?

A. Yes, sir.

Q. 4. And where the rock had broken loose from the ledge, between the ledge and the rock was a space of four of five inches?

A. Yes, sir.

Recross-examination:

Q. 1. The elevation of the rock from the railroad track was about four or five feet?

A. Yes, it would have been that far up.

The witness, JOHN FORTUNE, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. Your name is John Fortune?

A. Yes, sir.

Q. 2. Where do you live?

A. Live in Oakland Addition to Catlettsburg.

81 Q. 3. How long have you lived there?

A. About 20 years.

Q. 4. How near do you live to what is known as England Hill Cut, on the railroad?

A. About a quarter of a mile, I reckon, from my house.

Q. 5. You remember of a freight train that was derailed up there several years ago?

A. Yes, sir.

Q. 6. Before that accident—that wreck—had you ever had occasion to pass along the railroad and through that cut there?

A. Once in awhile I would pass up and down, yes.

Q. 7. Had you—how long before that wreck had you passed through it?

A. Well, I can't say exactly how long.

Q. 8. Well, was it a short while or a long while?

A. Yes, it was a short while.

Q. 9. About what was the height of that cut?

A. Well, I suppose it was something like 15 or 20 feet, might be twenty some thing.

Q. 10. What kind of material was in the cut?

A. Mixed up with all kinds of rocks.

Q. 11. All kinds of rocks and dirt?

A. Yes, slate and some hard rock and dirt.

Q. 12. Was it sand stone or lime stone?

A. Yes, sand stone.

Q. 13. Was there any soap stone in it?

A. Yes, there was soap stone in it.

Q. 14. Had you ever noticed any of the soap stone material or dirt slipping out of that slope?

A. Why, yes, now and then I had noticed it.

Q. 15. You had noticed it?

A. Yes.

82 Q. 16. Was there any rocks in the slope?

A. Yes, some. There was rock in there.

Q. 17. What size rocks?

A. Different sizes.

Q. 18. Before this wreck, did you notice any rock that differed from the other rocks, in any way, and if so tell the jury, if your attention was attracted to it?

A. Well, I noticed a right smart sized rock that laid in the bluff like.

Q. 19. What attracted your attention to it?

A. I don't know, I just happened to be passing and happened to notice it.

Q. 20. What caused you to notice it?

A. I just thought it had slipped out of the bluff, you know.

Q. 21. It had slipped out of the bluff and that was what attracted your attention to it?

A. Yes, sir.

Q. 22. How far had it slipped out?

A. I can't say exactly, "shoved" out a right smart, kinda leaning against the bluff like.

Q. 23. Loose from the rest of the bluff?

A. Looked like it to me.

Q. 24. What space, if any, was there between it and the rest of the bluff there?

A. I couldn't tell exactly how much.

Q. 25. Was there any space?

A. It seemed to be laying out from the dirt and slate like.

Q. 26. What position did it occupy in the cut, this large rock?

83 A. Well, this rock you speak about, it lay in a kind of an angling shape against the hill like.

Q. 27. Was there dirt over any part of it?

A. I can't say might have been some dirt at the lower edge of it.

Q. 28. About how much of the rock was exposed there?

A. Well, there was, I suppose, four or five feet wide, and I reckon eight or ten feet long, probably.

Q. 29. You could see that much of it?

A. Yes.

Q. 30. Four or five feet of the width?

A. Yes.

Q. 31. And eight feet of the length?

A. Six to eight feet of the length.

Q. 32. Had that rock changed any in position during the time you noticed it there?

A. No, I don't remember noticing it only the one time in passing it.

Q. 33. You noticed that it had slipped from the rest of the bluff?

A. Yes. Had come out from the rest of the bluff there, had slipped down.

Q. 34. About how long before the accident was it that you noticed it in that condition?

A. Well, I can't say exactly.

Q. 35. About how long?

A. The accident happened in May, about the first of May——

Q. 36. May, 12th?

A. Probably, it might have been April when I was along there, but I generally go around up there a good deal in the Spring of the year looking after business.

84 Q. 37. Was there any thing about the base that it was laying on that indicated to you that the rock might fall?

A. Well, it was laying kinda with a foot hold in the bank, like soap stone you might call it—it didn't seem to be laying right.

Q. 38. A slaty loose material under it?

A. Yes, sir, there was a kind of soap stone under it, there was a little "grain" of coal under there. Of course always slate and soap stone about a coal bank.

Q. 39. Did you ever see that rock after the wreck?

A. Yes, sir.

Q. 40. Where was it?

A. It was on the lower side of the road.

Q. 41. You saw them when they were taking it off the track?

A. No, sir, I didn't see it, I was on top of the hill. Wasn't down at the railroad at all. I saw the wreck laying there.

Q. 42. When was that, the next morning?

A. Next morning, yes, sir.

Q. 43. Could you see that rock?

A. I didn't notice the rock at all.

Q. 44. You were up on the hill?

A. Yes, saw some people around down there, I didn't go down among them.

Cross-examination:

Q. 1. How far above the track was this rock that you speak of?

A. Above the level of the track?

Q. 2. Yes?

A. I suppose two feet, or more.

Q. 3. The bluff at that point was almost straight up and down was it not?

A. Well, it leant back a little bit, sloped back some.

85 Q. 4. It sloped back some, but not very much was it?

A. No, pretty near a square cut of course it sloped some.

Q. 5. Describe the position of this rock to me again, will you?

A. The size of the rock?

Q. 6. The rock itself, the way it was in the hill?

A. It was about four or five feet wide, and eight or ten feet long.

Q. 7. How much of the rock could you see?

A. That is all I could tell about, what I could see couldn't tell any thing about what I couldn't see, only guess work.

Q. 8. Just consider for a moment the top of this table, this is the length of the rock and this is width?

A. I understand.

Q. 9. And this is the thickness and then the top surface, of course, was about as long as this is wide?

A. Yes, sir.

Q. 10. Just show the how the rock extended into the hill, to the jury?

A. Well, it didn't—It laid up against the hill like.

Q. 11. Laid up against the hill on its end?

86 A. "Kinda" leant up like.

Q. 12. The- if I take the top of this table and lean *up* up like that against the side of the room would that be the position it was in? (Indicating.)

A. Well, "kinda" sloped like, leaned back against the hill.

Q. 13. Then what you mean to say to the jury is, that if I take this top of this table and lean it up against the side of the house there, *what* would be the position the rock was in that what you want the jury to understand as being the position of the rock?

A. It wasn't perpendicular, the side of the house is perpedicular, and the bluff up there is sloped.

Q. 14. The- it laid on the slope there, whatever slope there was?

A. Yes, sir.

Q. 15. How much of the top surface of that rock was exposed to view?

A. I think four or five feet wide and about eight or ten feet long.

Q. 16. Then you could see sixty square feet of the surface of the rock on top, that what you mean?

A. Standing on the track, could see up on the bank.

Q. 17. Standing on the track looking at the rock cliff you could see about 60 square feet of its top surface?

A. I suppose so, I made no estimate of it.

The witness, JOE LIKENS, being first duly sworn, testified as follows, to-wit:

87 Direct examination:

Q. 1. Where do you live?
A. I live up on the Sandy road here.
Q. 2. About how far from the England Hill cut?
A. O! About a mile, may be a little more—about a mile.
Q. 3. A mile above it or below it?
A. Above it.
Q. 4. You live along the line of the Chesapeake & Ohio Railway?
A. My land goes to the road.
Q. 5. Your land goes to the railroad?
A. Yes, sir.
Q. 6. Is that cut between your home and Catlettsburg?
A. Yes, sir.
Q. 7. In going to and from Catlettsburg, do you pass along the railroad and through that cut?
A. Which?
Q. 8. When you would go to Catlettsburg, from your home would you go through the cut?
A. Yes, sir, I could go around.
Q. 9. You walk the railroad, and go through the cut?
A. Yes, sir.
Q. 10. And how long have you been accustomed to passing through that cut?
A. Ever since it was made, I hauled feed and stuff to the railroad when they was making it.
Q. 11. You remember the time when the freight train was derailed and Mr. Dwyer was killed?
A. I just didn't keep any account of it, 1910, I think it was.
88 Q. 12. You remember that it happened?
A. O, yes, I was down there next day and saw the wreck, I see it about two times a week, going to town and some times six.
Q. 13. Now just describe to the jury, Mr. Likens, that cut, as best you can—the material in it?
A. How long and how high or what?
Q. 14. How long and how high and what material it was made of?
A. Well, the cut would be right some thing near 20 feet——
Q. 15. 20 feet high?
A. Would be that high, the best of my judgment.
By the Court: How long was it?
A. Well, it will average about, from thirty to thirty-five T. rails in length.
Q. 16. What kind of material in that slope?
A. You mean in the cliff?
Q. 17. Yes.
A. Soft places and hard places, and like that?

Q. 18. What kind of rock, if any?

A. Well, there is hard rock and soft rock.

Q. 19. Lime stone or sand stone or shale?

A. Kind of a slate*ly* rock, and ore beds and such as that, mixed with hard rock.

Q. 20. How far back from the railroad track does this slope begin—the lower part of the slope, how far is it from the rail-road?

A. You mean sloped back that way? (Indicating.)

Q. 21. From the railroad track?

A. I know, it is pretty near straight up and down until you get to the top of it.

Q. 22. How wide is the ditch between the railroad and the hill?

89 A. It is very narrow.

Q. 23. About how much?

A. I suppose, would be five or six feet on a side, not over that.

Q. 24. Before this wreck occurred had your attention been drawn to any rock in that cut that laid different from the others in the cut?

A. Yes, sir—This here one that fell in, I have noticed that rock.

Q. 25. How came you to notice it?

A. O! I would be passing there, may be I would stop there and just look around and just notice it like anybody would.

Q. 26. What attracted your attention about it, that it was different?

A. Well, it just looked like a rock that was dangerous, might fall down there and cause a wreck.

Q. 27. What made it look dangerous?

A. Just because it was up there against the side of the cliff.

Q. 28. Did it look like it was attached to the cliff so that it would not fall?

A. No, sir, it wasn't attached to the cliff, because it was loose from the cliff.

Q. 29. And how far from it?

A. You could see it had dropped down and hung out away from it, about five or six inches, the other end that laid against the cliff, not loose.

Q. 30. The upper end was five or six inches from the cliff?

A. Yes, "Sorter" dropped down that way from the cliff up the river——

90 Q. 31. Was it a part of a ledge of rocks or loose there in the dirt, the rock that fell, this big rock?

A. It was different, laid up against the side of the cliff there and the other end it run in there enough to keep it from slipping out it looked like that end that hung against the cliff——

Q. 32. That was the lower end?

A. Lower end, this way.

Q. 33. How much of the rock could you see—I understand you to say that there was a space of between five or six inches, between the cliff and the rock at the upper end?

A. Five or six, between five and six inches wide.

Q. 34. How much of the rock could you see?
A. About half of the length, could see the full width——
Q. 35. What about the width of it?
A. I would say it would be about the same width clear through.
Q. 36. Could you see the whole width of it?
A. Yes, the upper end was naked, see the whole width of it, run the same width all the way——
Q. 37. About what size was the rock?
A. You mean how wide?
Q. 38. And how long and how wide?
A. Well, it would average right about ten feet long, now, looks like, been broke when they got it off the track, out of the cut.
Q. 39. That long where it is laying now?
A. Yes, sir, some thing near ten feet now.
Q. 40. Where is it laying now?
A. Right there on the side of the track, on the side of the
91 dump.
Q. 41. Was it larger when it was in the slope?
A. Yes, been a whole lot of it broke off.
Q. 42. You know who broke that?
A. I guess the [illegible]road company broke it when they lifted it out with the derrick, I don't suppose anybody else would.
Q. 43. You don't know who did that?
A. No, I don't know who broke it, don't know it was broke, of course.
Q. 44. Now how long before this wreck had you noticed this rock in that condition?
A. I noticed it every time I passed, just be walking along there.
Q. 45. How long a period of time before the wreck had you noticed the rock in there in that position?
A. I don't hardly know, been a right smart bit, for a year or more kept springing out there a little all the time.
Q. 46. Show any change in position during the time you noticed it?
A. Yes, sir, kept springing out, a man could tell that if he noticed it—I noticed it.
Q. 47. About how far above the level of the track was this rock in the slope?
A. You mean from the "T" rail?
Q. 48. Yes.
A. Where it lay up in the cliff?
Q. 49. Yes.
A. Between eight and nine feet.
Q. 50. Above it?
A. Up on the cliff.
92 Q. 51. Was that on the right of way of the railroad company there?
A. Yes, sir.
Q. 52. Did you ever hear the railroad section foreman up there say anything about the condition of that rock?
A. Me and George Arthur when he was section foreman up there,

was talking a little about it, and he said he always kept somebody to notice it of a bad night.

Q. 53. He said he always kept somebody to notice it of a bad night and he was section foreman?

A. He was section foreman at that time, but he wasn't section foreman there at the time it slipped in.

Cross-examination:

Q. 1. Where is George Arthur?

A. Well, sir, I guess he is under the ground?

Q. 2. Dead?

A. Yes, sir.

Q. 3. You think that rock is close to ten feet long now, you say

A. Yes, sir.

Q. 4. And that it must have been longer when it was in the hill?

A. Yes, sir, it was longer.

Q. 5. Because a portion of it has been broken off?

A. Yes, sir.

Q. 6. And that it is about six feet wide?

A. Yes, sir, if laid in straight, right close to six feet.

Q. 7. And about two feet in thickness all the way through?

A. About two feet thick from the looks of the rock, any way.

Q. 8. You could not tell how thick it was before it came out of the cliff, could you?

93 A. No, sir, I could not tell how thick it was before it came out, only at the upper end, don't know how far it was back in the cliff.

Q. 9. Laid back in the cliff, wasn't it?

A. Back against the side of the cliff, right that way. It didn't lay in the cliff, laid right against the side of it.

Q. 10. Why couldn't you tell how big it was?

A. If it had been out from under the dirt you could have told.

Q. 11. Then it was back in the cliff, wasn't it?

A. Until it slipped out, it was.

Q. 12. How far did you say it was from the T trail as you call it up to where this rock was?

A. Well, between eight and nine feet, laid right up against the side of the cliff, didn't lay up and down the cliff, laid right against the side of the cliff——

Q. 13. Didn't stand up on its end?

A. No sir.

Q. 14. Laid lengthwise.

A. Yes, sir, lengthwise. Laid back against the cliff—laid rather right up on its long end, long side of it that way—(indicating) and was covered by dirt and dropped down——

Q. 15. Down this way?

A. No, sir.

Q. 16. And it had not fallen from the cliff?

A. No, just stood out there——

Q. 17. And that was a point eight or nine feet from the railroad track, up above?

A. I suppose—my estimate, it would be eight or nine feet in the cliff—straight up and down.

94 Q. 18. Which part of it could you see there in the cliff?

A. Which part of what?

Q. 19. Of this rock, could you see the end of it, couldn't you?

A. Yes, sir.

Q. 20. Where was the other end?

A. Back against the sliff, as I told you?

Q. 21. Under the ground?

A. Back against the side of the cliff?

Q. 22. Back in the cliff?

A. No, it wasn't in the cliff—if it had been in the cliff, it wouldn't have fallen——

Q. 23. Didn't you say before that it was in the cliff?

A. No, sir, I didn't.

Q. 24. I am reading the transcript from the notes of the stenographer taken on the other trial. I will ask you if this question wasn't asked you and if you didn't make this answer:—I am going to read the official stenographer's report of your testimony on the former trial. Wasn't this question asked you, and didn't you make this answer: "Q. 27. Which part of it could you see? A. One end. Q. 28. It had two ends? A. Yes, sir. Q. 29. Where was the other end? A. Under the ground. Q. 30. Back in the cliff? A. —. Q. 31. That rock was part of the formation of the cliff, wasn't it? A. Of course. It gave away from that cliff as a matter of course." Wasn't those questions asked you before and didn't you make those answers just as I have read them to you?

A. How is that?

Q. 25. So I have to read them again to you, do I? I will read them again and I want you to pay close attention. Wasn't you asked this question and didn't you make this answer "Q. 27. Which part of it could you see? (Meaning the rock) A. One end?

A. Yes, sir.

95 Q. 26. And then wasn't this question asked you, "Q. 28. It had two ends?" and didn't you make this answer, "Yes, sir,"? "Q. 29. Where was the other end? A. Under the ground? Q. 30. Back in the cliff? A. Yes, back there, of course. Q. 31. That rock was part of the formation of the cliff, wasn't it? —. Of course, it give away from that cliff as a matter of course." Were those questions asked you and didn't you make the answers that I have just read to you? That is on the other trial of this case?

A. Back against the cliff——

Q. 27. You can answer what I want to know by yes or no. On the last trial, whether or not you made those answers, to those questions?

A. It was back against the cliff——

Q. 28. Then you don't want to say whether you testified that way at the other trial of this case or not, what I have read?

A. I told you it was right back against the side of the cliff, that is the way it stood all the time, under the dirt—It didn't stick in the hard dirt.

Q. 29. And wasn't this question asked you before and didn't you make this answer;—"Q. 31. That rock was part of the formation of that cliff wasn't it? A. Of course. It give away from that cliff as a matter of course." Wasn't that question asked you and didn't you make that answer? Were you not asked what I have read to you and did you not make those answers?

A. I have told you what I knew about the rock.

By the Court: Answer it yes or no?

A. Of course, I made some of them, I guess.

96 Q. 30. The end of it was under the ground any how, wasn't it?

A. Yes, sir.

Q. 31. And to get under the ground didn't it have to go back on the cliff?

A. Back against the side of the cliff.

Q. 32. If it was back against the side of the cliff, wasn't under the ground was it?

A. Yes, one end of it. There is where it held.

Q. 33. One end of it was back under the cliff?

A. Against the cliff—of course there could be loose dirt on that end—could be up against the cliff.

The witness FLOYD SCHUMP, being first duly sworn, testified as follows to-wit:

Direct examination:

Q. 1. Where do you live?

A. Ashland.

Q. 2. What is your occupation?

A. Engineer.

Q. 3. For whom?

A. C. & O.

Q. 4. Were you on the train that was wrecked up here at England hill cut in May 1910?

A. Yes, sir.

Q. 5. What were you doing?

A. Fireing.

97 Q. 6. What kind a train was it?

A. Freight.

Q. 7. Double header, was it?

A. Double header.

Q. 8. You mean by that that there was two engines pulling the train.

A. Two engines.

Q. 9. Which engine were you fireing?

A. Fireing the head engine.

Q. 10. Who was your engineer?

A. Diamond.

Q. 11. Who was engineer on the second engine?

A. Dwyer.

Q. 12. Richard Dwyer?

A. Yes, sir.
Q. 13. Who was his fireman?
A. Gayhart.
Q. 14. You were working for the Chesapeake & Ohio Railway Company at that time?
A. Yes, sir.
Q. 15. Were these engines derailed there at England Hill cut there, at that time?
A. Yes, sir.
Q. 16. What caused that wreck?
A. A rock and slide on the track.
Q. 17. From the cut?
A. From the cut.
Q. 18. What time of night was it?
A. About 1:25.
Q. 19. Was the train going down?
A. Going west.
Q. 20. Where had it started from?
A. Shelby.
98 Q. 21. On its way to Ashland and Russell.
A. Russell.
Q. 22. When the train—the front engine, the one that you were on, did it hit that rock?
A. Yes, sir.
Q. 23. What did you do?
A. Jumped off.
Q. 24. What became of the second engine?
A. The second engine went towards the cut, towards the bank.
Q. 25. Which way did the front engine go?
A. Went to the road——
Q. 26. Which way did the front engine turn?
A. Towards the river.
Q. 27. Which way did the second engine turn?
A. Towards the hill, the second one didn't turn over, left the track that way.
Q. 28. It left the track, but wasn't turned over?
A. No.
Q. 29. What became of Mr. Dwyer?
A. Why he got down by the side of the fire box and was killed.
Q. 30. And he was by the side of the fire box of the second engine and was carried to Mr. Compton's house and died there?
A. Yes, sir.

Plaintiff at this point introduced in evidence Dr. Wigglesworth's mortality tables, showing the expectancy of life at 45 years of age to be 23.92, and 43 years of age the expectancy of life is 24.77 years.

99 By the Court: The statement as to what the life tables show as to the expectancy of life of the deceased, Richard Dwyer, and his wife, is to be considered by you in connection with the state of health and habits of the deceased and the plaintiff as to

the probable duration of their lives and is to be considered for that purpose only.

The foregoing was all the evidence offered or introduced by the plaintiff in chief, and thereupon the defendant moved the Court to peremptorily instruct the jury to find for it, to which motion the plaintiff objected, and the Court upon consideration of said motion and objection overruled said motion and sustained said objection, to which ruling of the Court, the defendant excepted.

Thereupon the defendant introduced the following evidence to sustain the issue in its behalf. First the witness, BARNEY WELLS, being first duly sworn testified as follows, to-wit:

Direct examination:

Q. 1. How old are you?
A. 44.
Q. 2. Where do you live now?
A. I live in South Catlettsburg, Hampton City, rather.
Q. 3. What is your occupation?
A. Section foreman.
Q. 4. For the Chesapeake & Ohio Railway Company?
A. Yes, sir.
Q. 5. What comprises your section, what proportion of the road?
A. Six miles—for six miles of track.
100 Q. 6. From where?
A. From Big Sandy Junction, to mile post 6.
Q. 7. Does that Section include what is called the England Hill cut?
A. Yes, sir.
Q. 8. Were you in charge of that section in the year 1910, the month of May, 1910?
A. Yes, sir.
Q. 9. You remember the time of the derailment of a freight train going towards Catlettsburg, from which Dwyer received injuries which resulted in his death?
A. Yes, sir.
Q. 10. In the England Hill Cut, now describe to the jury as near as you can the formation of the England Hill cut.
A. Well, England Hill cut is about 300 feet long—that is the cut is, and the cut on the left hand side is about—well, it runs all the way from 5 to 15 feet high, and on the right hand it runs from five to six feet, or may be seven feet high.
Q. 11. The right hand side, you are speaking of the right hand side coming this way?
A. Yes, sir, river side.
Q. 12. The left hand side you speak of, that is the hill side?
A. Yes, sir.
Q. 13. The height of the cut on the hill side runs from five to fifteen feet?
A. Yes, sir, may be some places more, never measured it, fifteen feet in heighth——

Q. 14. What is the character of the rock in that cut, in the hill side?

A. Rock mostly all the way through there, it lays in seams, the rock does—part slately rock and part hard rock, I don't
101 know whether to call it lime stone, or lime sand stone, but it is a pretty hard rock through, it lays in seams.

Q. 15. You say it lays in seams, how does the hard rock lay in the hill, also the slately formation?

A. Well, it lays in the hill that way—(indicating)—with the edge out that was.

Q. 16. The edge projecting out?

A. Yes.

Q. 17. You remember the rock that was taken away from the track the morning after the derailment?

A. Yes, sir.

Q. 18. That rock form a part of the cliff formation there in that cut?

A. Yes, sir.

Q. 19. Whereabouts was that rock?

A. It was in the West end of the cut, towards Catlettsburg.

Q. 20. That is the end towards Catlettsburg?

A. Yes, sir.

Q. 21. About how high up was it?

A. It was about seven feet from the top of the rail.

Q. 22. Describe to the jury just how that rock laid in the cliff.

A. Well, the rock laid in the cliff this way, (Indicating) with its upper corner showing out, the dirt and slate rock on top this way and under here was an air slack of material and it just crumbled from that air slack——

Q. 23. What were the dimensions of the rock?

A. I believe the rock would be about eight feet long, about four feet wide and—about 18 inches thick, may be two feet.

102 Q. 24. You say I believe, that one corner of it projected out?

A. Yes, one corner projected out.

Q. 25. That is, of the side of the cliff?

A. Yes, sir.

Q. 26. That cliff is of a rocky formation, slately?

A. Yes, sir.

Q. 27. Corner sticking out, that would be the way of it?

A. Yes sir.

Q. 28. Which corner projected out, the West corner or the east corner?

A. East corner.

Q. 29. That the part that was coming out?

A. The east corner—that is the lower corner—that was the one that showed.

Q. 30. The East end is the end up the river?

A. Yes, sir.

Q. 31. Underneath that, it projected back in the hill?

A. Yes, you couldn't tell how far the rock laid back in the hill until after it fell out.

Q. 32. This large rock, and if it was flat, it extended back into the hill just as that shows it, this piece here shows it exactly? (Indicating.)

A. Yes, sir.

Q. 33. Now how often did you go through that cut?

A. Probably I went through twice a day. My work was all on the East end nearly, but a short distance this way, wasn't very much work to do on the west end of the section, always worked East,—Just East of the tool house I suppose, 500 feet may be, 1500 feet West of the tool house.

103 Q. 34. What was the last trip you made through there before the derailment?

A. The last time, I suppose I was through there, was about 5:15 in the evening.

Q. 35. I forgot to ask you, when you took charge of that section?

A. I taken charge September 5th, or 6th, before this accident happened in May.

Q. 36. You say you took charge September 5th, 1909?

A. Yes, sir.

Q. 37. And this derailment occurred May 12th, 1910?

A. Yes, sir.

Q. 38. You had been working there six or eight months at the time of the derailment?

A. Yes, sir.

Q. 39. And it was a part of your duties to look after the cuts?

A. Yes, sir.

Q. 40. And the condition of the rocks in them?

A. Yes, sir.

Q. 41. During that six or eight months had there been any falling of the rock on the track there?

A. No, sir, no rock hadn't fallen, had I never seen it.

Q. 42. While section foreman, prior to the time of the derailment were you ever on top of the cliff?

A. Yes, I was on the cliff, I couldn't tell you just how many times, had been there more than once all along on top of the cliff.

Q. 43. Any thing there to indicate to you that this rock in question was not safe?

A. Not a thing.

104 Q. 44. What caused the rock to fall?

A. Well, sir, I took it the dirt on top of the rock being so heavy, the air slack came in it about where this seam was, it got top heavy and it dropped off.

Q. 45. Could you see that seam?

A. No, sir, you could tell there was a seam of rock, but there wasn't any openings in it.

Q. 46. You say the dirt on top kept coming down on the rock?

A. Yes, sir.

Q. 47. Had it been raining any just before that?

A. Yes, sir, had been raining some that night, a kind of drizzling rain.

Q. 48. You were there after the accident?

A. Yes, sir.

Q. 49. Say whether or not there was any dirt on the track?

A. Yes, sir, there was some dirt and small rock on the track.

Q. 50. Where did the dirt come from?

A. Some above the rock, and some below, right smart little pile of it.

Q. 51. This heavy rock, was it struck by the train?

A. It was struck by the rear engine, I don't think that the front engine ever struck the big rock.

Q. 52. Was there another rock that fell out?

A. Yes, sir, but the small rock laid under the big one.

Q. 53. Both came out of the cliff?

A. Yes, sir.

Q. 54. Did the small rock lay over the track?

A. Yes, sir, it was more of a slate rock than the other.

105 Cross-examination:

Q. 1. It was your business to look after the safety on the track on the right of way for this space of six miles?

A. Yes, sir.

Q. 2. How many men help you in that work?

A. I believe I had five men at the time.

Q. 3. Five men?

A. Yes, sir.

Q. 4. Did you notice this big rock in the side of the cut there as you would pass through it?

A. Yes, sir, I noticed it, the part of the rock that was showing.

Q. 5. How many times did you notice it in passing through the cut?

A. Well, practically every time I went through the cut, I would notice it, noticed the rock in the cut every time I went through there.

Q. 6. You looked at this rock every time you went through the cut?

A. I don't know that I looked at that one any more than the rest of them, just noticed how the rocks were there all the way through.

Q. 7. How are you enabled to remember about the position of this rock in the fall?

A. Well, I know it fell, and naturally one would remember it, have an accident like that he would remember it.

Q. 8. You went there after the accident?

A. Yes, sir.

Q. 9. You say the end up the river was exposed?

A. Yes, sir, it was showing, couldn't see it all, could see the end of it, East end, couldn't see the west end but the rock was showing——

106 Q. 10. The rock was practically all back in the hill, horizontally?

A. Yes, sir, back in the hill.

Q. 11. And considered a part of the ledge, or cliff there?

A. Yes, sir.

Q. 12. It was covered with dirt?

A. Yes, sir, and slate rock.

Q. 13. I understood you to say that dirt falling down on it, broke it loose?

A. It was the dirt on top—I think the weight of the dirt on top caused it to break loose.

Q. 14. Also dirt under the rock?

A. No, sir, no dirt under the rock.

Q. 15. The side of the rock was exposed?

A. Yes, a part of it.

Q. 16. How far was that rock projected over?

A. About a foot.

Q. 17. In going along the rail-road you could see this long rock in the hill, projecting out about a foot, and this pretty heavy weight on top of it?

A. Yes, sir.

Q. 18. What caused it to project out the way you say it did?

A. I couldn't say unless it was that the slate and coal material under it had air slacked and fell out.

Q. 19. Slate and coal under it?

A. Yes, sir.

Q. 20. What is the effect of the elements on slate and coal?

A. I couldn't hardly say.

Q. 21. Air slack, or whatever you call it?

A. Air slacked slate will crumbly.

Q. 22. Cause it to crumble and wash out?

107 A. Yes, sir.

Q. 23. How long had you noticed that this slate and coal under this rock had been air slacking and crumbling?

A. Well, there wasn't enough to notice it—wasn't enough to notice that it was falling at any time.

Q. 24. But it had fallen out from there, hadn't it?

A. It had fell some, yes.

Q. 25. You say it was air slacked and kept crumbling out—it was your judgment as you went along that it was air slacking and crumbling a little?

A. I couldn't see anything fall in the ditch to fill up the ditch, wasn't anything fell to amount to anything.

Q. 26. It kept crumbling all the time you passed there?

A. I suppose it did. Wasn't enough to fall in the ditch to amount to anything.

Q. 27. What do you mean by not to amount to anything?

A. To fill the ditch so we would have to clean it out.

Q. 28. But there was some fell, enough for you to notice it?

A. A small bit, didn't enough fall to have to clean it out.

Q. 29. But any how it kept falling?

A. Yes, sir.

Q. 30. A little bit of stuff would fall?

A. Yes, sir.

Q. 31. And you saw that it came from under this big rock?

A. I couldn't tell the rock was giving away——

Q. 32. Didn't you say you noticed the crumbling under this big rock, that it was coming from there?

A. Well, a small bit I said, not enough to have to clean the ditch out.

Q. 33. How many times did that happen? How many times did you notice that it had air slacked and that stuff had fallen down in the ditch?

108 A. I couldn't say.

Q. 24. Didn't you notice it off and on during all the time you were passing through that cut?

A. I noticed, the rock, yes, sir.

Q. 35. Didn't you notice the air slacking of this stuff under it?

A. Not enough to amount to anything, to have to clean the ditch out during that time, under this rock, didn't have to clean the ditch out.

Q. 36. You testified in this case once before, didn't you?

A. Yes, sir.

Q. 37. I will read—to you from the official stenographer's report of that trial and ask you if you wasn't asked these questions on—the other trial—and didn't you make these answers: "Q. 5. Would you notice the rock when you passed there? A. Yes, sir. Q. 6. Ever notice this rock when you passed there? A. I wouldn't look at it any more than the rest. Q. 7. You noticed the rock when you passed? A. Yes, sir. Q. 8. You noticed the dirt coming from up there? A. I noticed the air slack, some little bit, yes. Q. 9. It kept crumbling all the time you passed there? A. Yes. Q. 10. Under this rock? A. All along under this heavy rock, it would crumble. Q. 11. That continued from the time you commenced up there until it fell. A. O, no, I couldn't say it continued all the time." Did you answer those questions that way?

A. I suppose I did.

109 Q. 38. And that is a fact?

A. Yes, sir, that is a fact.

Q. 39. Now this air slacking process continues along in wet weather as well as dry weather?

A. Yes, sir, it continues in dry weather as well as wet weather, a continuous process.

Q. 40. Did you go up and sound this rock?

A. Yes, sir, I was on this rock—more than once——

Q. 41. You was on this rock?

A. I was on this one and the rest of them, not all, of them, more than once.

Q. 42. When was that?

A. I can't say, some time before this accident happened.

Q. 43. Considerable time before, wasn't it?

A. I couldn't say, just how long before.

Q. 44. How came you to go on this rock?

A. I went up there to see if there was anything giving away on top of the cut, from one end to the other.

Q. 45. Did you go on this particular rock? Why did you go on it?

A. I didn't go on this particular rock any more than the rest.

Q. 46. You don't remember whether you went on it or not?

A. Yes, sir, I was on it.

Q. 47. You was on this rock?

A. Yes, sir.

Q. 48. How far were you from the track when you were up there?

A. I was just as close to the edge of it as I could get without going over, on the steep part——

110 Q. 49. You were on the hill side, beyond the top of the cut?

A. I was on the top of the cut.

Q. 50. You couldn't see under the rock from there?

A. Not from the top, I couldn't.

Q. 51. Could you see the rock at all from there?

A. From the top.

Q. 52. Yes.

A. I could see the upper corner, sticking out, so that I could see a small bit——

Q. 53. You noticed the upper corner of this rock, which was sticking out? It was part of your business to take down rocks and other material in cuts that might endanger the safety of the railroad?

A. Yes, sir, anything I thought was dangerous, my duty to take it down.

Q. 54. But you didn't try to take this rock down?

A. No, sir. I thought this rock was safe.

Q. 55. I didn't ask you that, I asked you if you tried to take it down?

A. No, sir, I did not.

Q. 56. This England Hill cut was known as a dangerous cut wasn't it?

A. Well, there hadn't been anything at all fallen since I had taken charge, used to be dangerous——

Q. 57. Didn't they keep a watchman for the cut?

A. Never kept any watchman——

Q. 58. It was dangerous in May, 1910, wasn't it?

A. It was dangerous on that night, I don't know——

111 Q. 59. But it was known as a dangerous cut, wasn't it?

A. Hadn't been any watchman there, wasn't considered dangerous.

Q. 60. Say whether or not it was known among the section hands and the employes of the Company as being a dangerous cut?

A. Well, I couldn't say.

Q. 61. You knew that stone and dirt had fallen out of this cut before, didn't you?

A. I knew it had fallen out before, yes, sir.

Q. 62. Several times before this accident.

A. Yes, sir.

Q. 63. What would have been the method, according to your instructions of getting that rock out of that slope?

A. We could have took a drill and went in and drilled a hole and shot the rock out.

Q. 64. With dynamite?

A. Yes, sir.

Q. 65. Wouldn't have taken but a few minutes?

A. No, sir, wouldn't have taken but a few minutes.

Q. 66. I believe you say there was a small rock that fell at the same time that the large one did?

A. Small rock came out, laying there, don't know that it fell just at the same time, might have dropped before or later, it was there with the large rock.

Q. 67. Both came down together?

A. Yes, sir, they were both together.

Q. 68. Just before you took charge there as section foreman there had been a bad slip in that cut, hadn't there?

A. On the East end, I heard the men that worked for me say, sometime before I came, there had been a rock fall out on the East end.

112 Redirect examination:

Q. 1. The projection of the rock, where you speak of, you could see, and had seen the corner of the rock there?

A. Just the corner projected out, yes, sir.

Q. 2. You went over all the cliff, you went over the top of it from one end to the other?

A. Yes, sir.

Q. 3. And over all the rocks, in connection with your examination of the cut, the hill side?

A. Yes, sir.

Q. 4. This crumbling you speak of in the side of the cut, was a gradual crumbling away?

A. Yes, sir.

Q. 5. That was true, through the whole cliff?

A. Yes, sir, no more on this one than the rest of them.

Q. 6. That happens in any cliff with a formation of that kind?

A. Yes, sir.

Q. 7. And this crumbling had not been sufficient to fill up the ditch before this accident, was it?

A. No, sir.

Q. 8. Or the ditch had not been opened, cleaned out?

A. No, sir.

The witness, JAMES MCGUIRE, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. What is your age?

A. 43.

Q. 2. Where do you live?

A. Ashland, Kentucky.

113 Q. 3. What is your present occupation?

A. Section foreman, Ashland Yards.

Q. 4. Section foreman in the Ashland Yards?

A. Yes, sir.

Q. 5. In May, 1910, what were you doing?

A. Supervisor of Track, Big Sandy Division.

Q. 6. That embraces what is known as the England Hill cut?

A. Yes, sir.

Q. 7. The cut in which the derailment occurred which resulted in the death of Mr. Dwyer?.

A. Yes, sir.

Q. 8. How long had you been Supervisor of Track of the Big Sandy Division.

A. About two years.

Q. 9. In the performance of your duties as Supervisor did you or not pass up and down the river on the track of the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. 10. And through this cut, how often?

A. Why, three or four times a week.

Q. 11. Did you notice the England Hill cut on those trips that you made?

A. Yes, sir, I looked at it as I went through there.

Q. 12. You know the character and formation of the rocks in that cliff?

A. A little bit, yes, sir.

Q. 13. How were they—how did they rocks lay in the hill?

A. The rocks laid on a level, horizontally in the hill.

Q. 14. Flat ways?

A. Yes, sir.

Q. 15. Ledges of rock?

A. Yes, sir.

114 Q. 16. Did you ever walk along through the cut, or did you ride through on a train?

A. Rode through on a train, and walked through the cut too.

Q. 17. Did you notice that cliff and the sides of it—the rocks in the hill—that is next to the hill—notice this rock?

A. Yes, sir, I have noticed it.

Q. 18. Was there anything to indicate to you that this rock in question that fell down was dangerous?

A. No, sir.

Q. 19. Did you see that rock after it fell?

A. Yes, sir.

Q. 20. What was the size of it?

A. Why, it was about 8 feet long and 4 feet wide, and about 20 inches thick, along near about that.

Q. 21. How soon did you get there after the accident?

A. I got there about six o'clock the next morning.

Q. 22. What was on the track the next morning, I mean that came out of the hill side?

A. Rock and dirt.

Q. 23. Have you a judgment as to how that rock came to fall out of the hill—what caused it, to fall out of the hill?

A. It slipped from the top of the bank, pulled the rock out.

Q. 24. The dirt pulled it out?

A. Yes, sir, the dirt back of the rock pushed it out.

Q. 25. How much dirt was there on that track at that time?

A. There was about two feet.

115 Cross-examination:

Q. 1. You were Supervisor of Track from Ashland to Elkhorn City?

A. No, sir, from Hampton Junction.

Q. 2. About 118 miles?

A. Yes, sir.

Q. 3. You didn't give any particular attention to these different cuts?

A. I noticed them very closely to see if there was any danger, yes, sir.

Q. 4. Hundreds of cuts in that distance?

A. Yes, sir, quite a lot of them.

Q. 5. You never made any particular examination of this cut?

A. I didn't particularly examine it. No, sir, I didn't.

Q. 6. But you seen this rock in there that fell?

A. I don't know as I noticed this particular rock that fell, I noticed the rocks in there.

Q. 7. I believe this cut had a number of rocks in it, a ledge of rocks through it?

A. The rocks laid in there flat ways. Yes, sir, a ledge of rocks.

Q. 8. You are just speaking of the rocks generally that laid in there, you don't know if this rock was loose or not?

A. No, sir, I don't.

Q. 9. How was it laid in the hill?

A. It laid flat ways in the hill.

Q. 10. How do you know?

A. All of them did.

Q. 11. Was there a rock over this one?

A. I can't say if there was a rock over this particular rock or not.

116 Q. 12. You say it was a part of a ledge of rocks?

A. Yes, sir, it was on top—in this ledge——

Q. 13. This was on top, of the ledge—this rock?

A. Near the top of the cut, yes, sir.

Q. 14. Any rock over it?

A. I can't say positively there was or not.

Q. 15. Well, how do you know it was a part of a ledge unless you know that there was rock under it and another rock over it?

A. Yes, sir.

Q. 16. Wasn't there slate and coal under it?

A. There was some kind of a formation under there, I don't know what it is.

Q. 17. Was it a slatey substance—or a slate rock?
A. Slatey substance next to the bottom of the cut.
Q. 18. And next to this rock that fell out?
A. I couldn't say.
Q. 19. And you don't know if there was rock under it or not?
A. Rock under it, I can't say right exactly under the rock, dirt or rock, might be a few inches of dirt between that rock and another rock.
Q. 20. What was on top of this rock, dirt or other stuff?
A. Up the bank was dirt. Yes, sir.
Q. 21. Right next to it?
A. I can't say.
Q. 22. You don't know what was by the side of it?
A. No.
Q. 23. You don't remember if it was a part of a ledge, or a loose rock lying in that slope, you just gave your judgment generally—and you don't know how this particular rock was loose or not?
A. I couldn't say it was loose. No, sir.
Q. 24. You don't remember ever seeing this particular rock?
A. No. I don't know as I did.
117 Q. 25. Never saw it at all except as you passed through in the train, from the rear end of the train?
A. Yes, sir.
Q. 26. Going 25 or 30 miles an hour?
A. I don't know if it was going that fast or not.
Q. 27. That is the only inspection you gave it as you went through on the rear end of the train?
A. Yes, sir.

Redirect examination:

Q. 1. You saw it after it had slipped from the hill side?
A. Yes, sir.
Q. 2. Slides there where the rock came down?
A. Yes, sir, back of the rock.
Q. 3. You saw that cut the next morning and the slip in the hillside?
A. Yes, sir.

The witness, L. B. ALLEN, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. Where about are you located at present?
A. At Huntington, West Virginia.
Q. 2. Where were you located in 1910?
A. I was in Ashland—I was Division Engineer of the Ashland and Big Sandy Division, and was also Engineer of Maintenance of the Western Division.
Q. 3. Did you have charge of the track as Civil Engineer from Ashland up the Big Sandy?

118 A. Yes, sir.

Q. 4. What time did you leave that portion of the road?

A. May 1st, 1910.

Q. 5. That was just twelve days previous to the time of this accident?

A. Yes, sir.

Q. 6. How long had you had charge of that Division?

A. Yes, sir.

Q. 7. What is your profession?

A. Civil Engineer.

Q. 8. Are you acquainted with the cuts on the Big Sandy Division?

A. Yes, sir, I have a general knowledge of the Big Sandy Division from one to the other.

Q. 9. That knowledge includes what is known as England Hill Cut?

A. Yes, sir.

Q. 10. Describe to the jury the character of that cut?

A. Well, it is a rocky cut about 15 feet deep on the upper side, and 4 or 5 feet on the lower side and is a cut some six or seven hundred feet long.

Q. 11. Now what about the cliff on the hill side, that is with reference to the slope?

A. Well, it is an ordinary rock cut with a slope of—Well, between one foot and four, and two feet and four, just an ordinary rock slope cliff——

Q. 12. Was or not the slope the usual slope given for a slope of that kind, where the formation is such as that is, a rock cliff?

A. Yes, sir.

119 Q. 13. These kinds of cuts necessarily have rocks projecting out from the sides of them at times?

A. Yes, more or less rocks projecting out——

Q. 14. Impossible to make them out without having them that way is it not?

A. Yes, sir.

Q. 15. For how long and how often had you seen England Hill cut prior to the time you left that Division?

A. I went up that Division on an average once a week, passing back and forth through that cut.

Q. 16. In passing through it would you notice it and look at it?

A. Yes, sir. I always observed the cuts and the general character of the road all the way along. That was a part of my duties.

Q. 17. On the sides of the cliff next to the hill—anything there that indicated that there was any danger there of any rock falling out?

A. I never noticed any particular danger, or any special feature that that would call any particular attention to it.

Q. 18. As a matter of fact any thing in the hill side that would indicate any danger, in connection with any rock?

A. No more than the usual cuts, rock cuts.

Cross-examination:

Q. 1. What did you say your official title was?

A. Division Engineer—Engineer of Maintenance of Way, at the time the accident occurred. Just previous to that I had been Division Engineer, had charge of all the track men and track forces and the road bed in general.

120 Q. 2. In the performance of your duties you rode up and down the Big Sandy river on the railroad trains?

A. Yes, sir.

Q. 3. You never stopped at England Hill cut?

A. I have walked through England Hill cut a number of times-Don't remember of any special time though.

Q. 4. That was several years before this accident, wasn't it?

A. No. No, sir. Might have been a month before. I couldn't tell.

Q. 5. In fact wasn't it a year or so before this accident since you had been in this cut, walking?

A. My best judgment is I had been through that cut within two months previous to this accident, couldn't give the time exactly.

Q. 6. Walking?

A. Yes, sir.

Q. 7. And other times, most of the time you rode through on a train?

A. Various times I would get off the train and examine the tracks. Get off and walk between stations.

Q. 8. When was that?

A. I say; I can't tell, don't remember—don't recall now, don't remember any one particularly.

Q. 9. You don't know that you ever did—Don't you know that it is a fact that you did not?

A. No. I know I walked—I am confident I did.

Q. 10. The next station above that cut is Lockwood, ain't it?

A. There is Savage Branch in there.

Q. 11. That is about four or five miles above this cut?

A. Yes, sir.

121 Q. 12. And the next one this way to the cut would be Hampton City?

A. Yes.

Q. 13. And then you would have to walk seven or eight miles?

A. That is not far I walk that very often.

Q. 14. Is it customary for those who are designated as Engineer of Maintenance of Way to make walks to seven or eight miles between stations?

A. Yes, sir, that is part of his business.

Q. 15. And more often don't they ride in the parlor car or the Pullman car?

A. No, sir.

Q. 16. Did you notice this rock that fell that the witnesses say was loose in the side of the slope?

A. I didn't notice that particular rock, no, sir.

Q. 17. If the rock was sticking out from the slope—the side of the cliff—six or eight inches, from the main body of the cliff, and there had been an erosion by air slacking, and sufficient material had come out from under it until it was projecting over the slope a foot or more, would that indicate to you that there was any danger of it falling?

A. No, sir.

Q. 18. Would not?

A. No.

Q. 19. Is there any condition of a rock in a slope that would indicate to you that it was dangerous?

A. Why, yes, of course there is.

Q. 20. What would that be?

A. If the rock was entirely loose and attached to the slope and was showing signs of settling under the foundation and if the rock had moved and was off of the foundation and was liable to fall from any pressure, put on it—that would indicate the rock
122 was dangerous.

Q. 21. The fact that it projected out over a piece and was loose from the main part of the slope, wouldn't indicate any danger to your *main* at all?

A. No, if the rock was sticking out, it would not be any more likely to fall than a cope stone—Wouldn't fall simply because it projected out a little.

Q. 22. If there was the weight of other rock and stone and stuff on the rock in question and there was gradual erosion under it, say the rock was out—from the cliff six or eight inches, as much as 12 inches, as stated by Mr. Wells would that indicate to you that there was any danger at all?

A. If it was known that dirt and stuff above the rock was loose, and there was any signs of that moving, generally it might be well to look after it.

Q. 23. Suppose that there wasn't none, but a gradual crumbling of the material under the rock that sufficient to put you on notice as to it being dangerous?

A. Wouldn't pay any attention to that?

Q. 24. You would not?

A. No, sir.

Q. 25. You would not pay any attention to the fact that it was out six or eight inches from the slope?

A. Absolutely not.

Q. 26. What would six or eight inches indicate?

A. Just as safe as if it had been stuck back in the hill.

Q. 27. I am speaking about the part that projected?

A. Each particular rock would have to depend on its own condition and surrounding, but as a general rule it would not be dangerous, and no use to pay any attention to it.

123 Q. 28. Suppose the rock in question had slipped from time to time—and changed a little in position would you have noticed that?

A. According to how much it had slipped.

Q. 29. If it had slipped two or three inches you wouldn't have paid any attention to that as Engineer of Maintenance of Way?

A. According to the size of the rock and the general conditions around it?

Q. 30. Suppose that it was on a slope, same character that this slope was, almost perpendicular, as I understand it, if the rock had slipped down hill a few inches would that challenge your attention as being dangerous?

A. If a great big rock, sufficient foundation, had slipped two or three inches wouldn't pay any attention to it.

Q. 31. You say two or three inches, you wouldn't pay any attention to it?

A. You could carry it to a point where it would be dangerous of course.

Q. 32. You don't know where that point is?

A. I would have to consider the ground and the conditions and look at it from that point, I wouldn't like to state it in the Court room on a hypothetical question.

Q. 33. You didn't look at this rock on the ground?

A. No.

Q. 34. And the fact that the rock would slip a few inches wouldn't require your attention?

A. According to the conditions absolutely.

Q. 35. A rock 10 feet long, four or five feet wide, and a foot or a foot and half thick, lying in the side of a slope, the fact that it moves indicates that it is loose, from the rest of the cliff?

124 A. If it moves, have to be loose, of course.

Q. 36. Is a loose rock in a slope of that kind dangerous?

A. Not if it has got foundation enough to keep it from slipping any more.

Q. 37. What would you say about it?

A. I wouldn't take any chances.

Q. 38. What about this one?

A. I didn't notice this particular rock—I would examine it then to see, take no chances, but I didn't examine it.

Q. 39. When you said you take no chances, you mean take no chances but examine them and see?

A. Yes, sir.

Q. 40. And of course not having examined this one, you, of course did nothing

A. No. I didn't, in this particular case.

The witness, JOHN ARTHUR, being first duly sworn, testified as follows, to-wit:

Direct examination:

Q. 1. Where do you live?

A. I live five miles up Sandy road here.

Q. 2. How far did you live from what is known as England Hill cut at the time the derailment took place?

A. Four miles.

Q. 3. Above it?
A. Yes, sir.
Q. 4. In going to and from your home to Catlettsburg, did you pass through that cut.
A. Yes. sir.
125 Q. 5. You remember the occasion of the accident up there at England Hill Cut when Mr. Dwyer was injured and afterwards died?
A. I heard of it.
Q. 6. Prior to that tell the jury how often you passed through that cut in going to and from your home?
A. I would say twice a month.
Q. 7. Would you be walking or on the train?
A. Walked generally, sometimes on a train.
Q. 8. In passing through that cut tell the jury whether or not you observed the rocks in the cut and the rock cliff as you passed through?
A. Yes sir.
Q. 9. Did you at any time see or observe any rock there that looked or seemed to be dangerous or liable to fall?
A. I never noticed anything being dangerous, as I thought dangerous.
Q. 10. Did these rocks lay back in the hill in layers?
A. That was my idea, of the whole formation and they set back in the hill, that is the way I viewed them.

Cross-examination:

Q. 1. You didn't see this loose rock that fell from the hill?
A. No, sir, I might have saw it, never saw it fall.
Q. 2. Never noticed it when it was in the slope there?
A. No, I never did.

126 The foregoing was all of the evidence introduced or offered by both plaintiff and defendant, and at the conclusion of all the testimony the defendant moved the Court to peremptorily instruct the jury to find for it, to which motion the plaintiff objected and the Court upon consideration of said motion and objection overruled said motion and sustained said objection, to which ruling of the Court the defendant excepted.
Thereupon the Court instructed the jury as follows, to-wit:

No. 1.

The Court instructs the jury that it was the duty of the defendant, The Chesapeake & Ohio Railway Company, to exercise ordinary care to furnish or provide the plaintiff's decedent, Richard Dwyer, a reasonably safe place to perform the work he was employed to perform for defendant, taking into consideration the surrounding circumstances and conditions, and the nature and character of the place where the accident occurred, and the nature and character of the decedent's services he was employed to perform for defendant

at the time of the accident. And if the jury shall find and believe from the evidence that at the time and place of the injury to the decedent in question, mentioned and described in the evidence, that a rock in the earth, slate and stone forming the side of the cut on defendant's road at England Hill, was insecure or loose, and reasonably likely to fall on defendant's track, and that by reason thereof the track of defendant at said place was not in a reasonably safe condition for the performance of the work in which decedent was engaged at the time of his injury, taking into consideration the surrounding circumstances and conditions and the nature and character of the place and the work to be performed by decedent for defendant at said place, and that said unsafe condition, if any there was, at said place, was due to the failure on the part of defendant, or its agents and servants in charge of the maintenance and repair of its road bed and track at said place to exercise ordinary care to provide or furnish decedent a reasonably safe place for the performance of his duties as freight engineer, taking into consideration, the surrounding circumstances and conditions and the nature and character of the place where the accident occurred, and that the defendant, or its agents and servants in charge of the maintenance and repair of its road bed and track at the place in question knew, or by the exercise of ordinary care could have known, of said unsafe condition, if any there was, in time to have prevented the accident in question; and if the jury shall further find and believe from the evidence that by reason of said unsafe condition of the side of said cut, if such there was the rock in question fell from the side of said cut upon the track or road bed of the defendant's railroad in said cut, and as a result thereof the train in question, on which the defendant was in charge of one of its engines as engineer, on the occasion in question, collided with said rock, and a portion of said train was derailed, thrown from or caused to leave the track and roadway of defendant, thereby inflicting injuries upon the decedent, Richard Dwyer, of which he subsequently died; and if the jury shall further believe from the evidence that at the time of his decease the decendent had a wife, Sarah Dwyer, who is now living, and that at the time of his decease she was then dependent upon him for support and maintenance, then the law is for plaintiff and the jury should so find, and in that event fix her damages as indicated in instruction No. 4.

127

No. 2.

128 The jury are instructed that the defendant Company is not an insurer of the safety of its employes, and was only bound to exercise ordinary care to provide for the decedent, Richard Dwyer, a reasonably safe place in which to work, taking into consideration the circumstances and conditions and the nature and character of the place and the work to be performed by defendant, and by decedent for it at said place.

And in this case the jury are instructed to find for defendant unless they shall find and believe from the evidence that the acci-

dent to the decedent in question was directly and proximately caused by the negligence of the defendant as indicated in Instruction No. 1, if it was negligent as set out therein.

No. 3.

The jury are instructed that the decedent, Richard Dwyer, in accepting employment as engineer of the defendant Company, and in engaging or continuing in the work as engineer of a freight train on its railroad, assumed the risks or dangers ordinarily incident to the performance of his work as such engineer; and they are further instructed that the happening of the accident in question, from which Richard Dwyer, lost his life, of itself cannot be taken as evidence of the failure of the defendant, or its agents or servants in charge of the maintenance and repair of its road bed and tracks at the cut and place in question, to exercise ordinary care to provide a reasonably safe road bed and track at said place for the operation and passage of its freight trains thereon, but the jury may consider the happening of the derailment of the train on said occasion in connection with the other evidence in the case in determining whether the defendant Company or its agents or servants
129 aforesaid, failed in the performance of its duty as indicated in instruction No. 1, and if they shall believe from the evidence that the accident in question did not happen on account of the failure of defendant, or its agents or servants in charge of the maintenance and repair of the road bed and track at the place in question to exercise ordinary care to provide and maintain a reasonably safe road bed and track at said point for the operation of trains thereon, but from a cause, or causes, other than above stated, then and in that event it was one of the risks or dangers incident to the decedent's work or employment, and for which plaintiff cannot recover, and you will find for defendant should you so believe from the evidence.

No. 4.

The Court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate prob-
130 able earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

The Court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death.

Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer.

No. 5.

The jury are instructed that the term or phrase "Ordinary care" as used and meant in these instructions, is such care or that degree of care which ordinarily prudent persons engaged in like or similar business, occupation or employment are accustomed to exercise under like or similar circumstances to those shown to exist in this case from the proof.

131 And the word "negligence", as used and meant in instruction No. 2 means the failure to exercise ordinary care as defined in this instruction.

No. 6.

Nine of the jury concurring may find and return a verdict in the case; but if found and returned by any less than the entire jury then all the jurors who agree to it must sign their names to their verdict.

If all the jury agree on a verdict then only one of them will sign it as foreman.

To the giving of Instructions Nos. 1, 2, 3, 5, and 6, and each of them, the defendant objected and excepted, and still excepts.

That part of Instruction No. 4, to-wit:

"The Court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as a result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, Richard Dwyer, and in the event that the jury shall find for the plaintiff, they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

Was given on motion of defendant. To the giving of instruction No. 4, except as to the above clause given on their motion, the defendants and each of them objected and excepted and still

132 except.

Thereupon after argument by Counsel for both plaintiff

and defendant, the jury retired to their room, and after awhile returned into Court, the following verdict:

"We the undersigned jurors agree and find for the plaintiff in the sum of $16,000.00, Sixteen Thousand Dollars.

JOE STEWART.
S. H. BRYANT.
ALMON DARBY.
HUGH FAULKNER.
—— ROW.
J. G. RUCKER.
T. R. McGLOTHIN.
WILLIAM CAVERN.
A. T. GILLEY.

Thereupon the Court rendered judgment for the plaintiff upon said verdict.

The defendant thereupon filed its motion and grounds for a new trial herein. Said motion and grounds are in words and figures as follows, to-wit:

Boyd Circuit Court.

SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, Defendant.

Motion and Grounds for a New Trial.

Comes the defendant, Chesapeake & Ohio Railway Company, and moves the court to set aside the verdict of the jury in this case and the judgment of the Court entered therein and to grant it a
133 new trial thereof, and assigns these its grounds in support of said motion:

First. Because the verdict is contrary to law.

Second. Because the verdict is opposed to the overwhelming weight of the evidence.

Third. Because the amount of the verdict is excessive and so excessive that same appears to have been given under the influence of passion and prejudice.

Fourth. Because of error of the Court in excluding certain competent, relevant and material testimony offered by defendant, to which action of the Court the defendant at the time and in each instance objected and excepted.

Fifth. Because of error of the Court in admitting certain incompetent and irrelevant testimony offered by plaintiff, to which action of the court defendant at the time and in each instance objected and excepted.

Sixth. Because of error of the Court in giving to the jury instructions Numbers 1, 2, 3, 4, 5 and 6, and each of them, and to the

giving of each of said instructions the defendant at the time and in each instance objected and excepted.

WORTHINGTON, COCHRAN & BROWNING AND
PROCTOR K. MALIN, *Attorneys for Defendant.*

134 And the Court being sufficiently advised overruled said motion and grounds for a new trial, to which ruling of the Court the defendant excepted and prayed an appeal to the Court of Appeals, which was granted, and the defendant was given until and including the 10th day of the next term of this Court to prepare and tender its bill of exceptions herein.

Thereupon comes the defendant and within the time allowed it and presents the foregoing Bill of Exceptions, and it asks that same be signed and approved by the Judge of this Court, and found and certified to be true and to contain all the evidence offered or heard and all the instructions given, or offered or refused, all of which is accordingly done, found and certified, and the same is ordered to be made a part of the record herein without being spread on the order book herein.

W. C. HALBERT,
Judge Boyd Circuit Court.

135 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in the City of Frankfort on January 29, 1915, the following judgments and orders were entered, towit:

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from Boyd Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount of the judgment superseded herein. Which is ordered to be certified to said court.

It is further considered that appellee recover of appellant her costs herein expended.

At the same time, to-wit, January 29, 1915, said Court of Appeals delivered an opinion, which is in words and figures following towit:

136 Court of Appeals of Kentucky, January 29, 1915.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
RICHARD DWYER'S ADMINISTRATRIX, Appellee.

Appeal from Boyd Circuit Court.

Opinion of the Court by Judge Settle, Affirming.

This is the second appeal in this case, the opinion upon the former appeal being reported in 157 Ky. 590. As the facts out of which the action arose and questions of law involved, are fully set out in that opinion, it is unnecessary to repeat them here; it being sufficient to say that appellee's intestate, Richard Dwyer, who was a locomotive engineer in the employ of the appellant, Chesapeake & Ohio Railway Company, was killed May 12, 1910, at England Hill in Boyd County, by the derailment of a part of a freight train upon which he was employed as such engineer; it being alleged in the petition that the intestate's death was caused by the negligence of appellant in the particulars therein named, but, mainly, on account of its negligence and that of its servants, in failing to take the proper precautions to prevent the fall of debris upon the railroad
137 track resulting from a landslide at the place of the accident, which caused the derailment of the train. The action was brought under the act of Congress known as the "Employers' Liability Act," approved April 22, 1908, as amended by the act of April 5, 1910.

The first trial resulted in a verdict and judgment in appellee's favor for $14,000.00 damages. On the second trial occurring after the reversal of that judgment by this court, appellee recovered a verdict for $16,000.00 damages, and this appeal is prosecuted from the judgment entered upon that verdict.

It is not denied by counsel for appellant that the evidence authorized a recovery of damages for some amount, but insisted that the amount recovered on the last trial is grossly excessive, and that the trial court erred in instructing the jury as to the measure of damages. It is admitted that the deceased left but two children, a son and daughter, the former being an adult and the latter a married woman, and that neither of the children was dependent upon him for a support. So in determining whether or not the verdict is excessive only the damage sustained by the appellee widow can be considered.

It appears from the evidence that the deceased, Richard Dwyer, was a sober, industrious man, in good health and forty-five years of age, at the time of his death; and that he was earning $150.00 per month regularly, and often would receive from ten to twenty dollars per month, in addition, for extra time, which made his
138 monthly earnings vary from $150.00 to $170.00. According to the table introduced in evidence, the deceased at the time

of his death had an expectancy of 24.46 years. So, taking the $150.00 per month as a basis, he was earning $1,800.00 per year, which, if continued through the period of the expectancy, would have aggregated $44.028. If we accept $160.00 per month as a basis, which will probably be a fair average, his earnings would have amounted to $1,920.00 per year, and, during the years of the expectancy, reached $46,963.20. If we take $150.00 per month as his earnings during the period of expectancy, amounting altogether to $44,028.00, and it be assumed that only one-half thereof, $22,014.00, would have been required to support the wife had he lived, such half would exceed $6,014.00 the amount awarded by the verdict of the jury. If, however, we accept as a basis $160.00 per month, which, according to the proof would be a fair average, it would amount during the period of expectancy to $46,963.20, one-half of which, $23,481.60, would exceed by $8,481.60 the amount awarded by the verdict of the jury. If only one-third of his earnings would have been required for the support of the widow had he lived, taking $160.00 per month as a basis for what he would have earned during his life expectancy, such third, amounting to $15,654.40, would be only $345.60 less than the amount recovered. Under the award made by the jury the appellee, widow of the deceased, will only receive $654.13 each year of the 24.46 years of expectancy, which is doubtless less than she would have received had her husband lived during that time, even if allowance be
139 made for a reasonable diminution in the deceased's ability to earn money, that might be expected to result from the decline of strength during the latter years of such expectancy.

The contention of counsel for appellant, that the verdict of $16,000.00, if placed on interest at six per cent, would yield an annual income greater than the amount that the decedent's widow would have received had he lived and yet leave her the principal to dispose of at the time of her death, was declared in the case of C. & O. Ry. co. v. Kelly's Adm'x. 160 Ky., 296, to be without merit. In the opinion it is said:

"Appellant insists, under the principles of Gulf & Colorado Railway Co. v. McGinnis, 228 U. S. 173, and Mich. Cent. Co. v. Vreeland, 227 U. S. 59, that what the beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of dependency, but the present cash value of such aggregate amount. In other words, the amount awarded ought to be such that if placed at interest, would be wholly consumed when the time of dependency ceases, and that the jury should been so instructed. In the McGinnis case, supra, the court construes the Employers' Liability Act to provide compensation to cer-
140 tain surviving relatives of the employe, 'for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given.' With reference to the apportionment of the benefit of each, the jury must do this, 'measured by his or her individual pecuniary loss.' We are unable to see that the McGinnis case, supra, either in principle or by intimation, requires that the measure of damage in the instruction to juries should

be any different from the one in this case. In fact, the instructions, as above quoted seem to have been drawn to conform to the principles announced in the McGinnis case. The instructions limited recovery to the actual 'pecuniary loss.' Their whole loss was sustained at the time of his death. There is no more reason in appellant's theory, that the defendants should have discounted the loss, than there is that the Railroad Company should be adjudged to pay a fixed sum annually, semi-annually or monthly for their support. The award of the jury should be for the pecuniary loss suffered. While that loss is, in a measure, future support, the father's death precipitated it, so that it is all due, and we are not impressed with the argument that the sum due should be reduced by rebate or discount. The value of a father's support is not so difficult to estimate, and the average juryman is competent to compute it, but to figure interest on deferred payments, with annual rests, and reach a present cash value of such loss to each dependent is more than ought to be asked of any one less qualified than an actuary. We
141 believe the instructions are not only right in form and in principle, but are in harmony with the McGinnis case."

The age of the appellee widow at the time of her husband's death was forty-three, two years younger than the husband, consequently, her expectancy of life was practically the same as his; and the criterion of recovery being only the actual pecuniary loss resulting to the widow from the death of the husband, as the amount recovered is less than one-half of what the gross earnings of the decedent would have been during the probable duration of his life and not more than the widow would probably have received out of such earnings for her support, had he lived, there is, in our opinion, no ground for appellant's contention that the verdict is excessive.

Appellant's complaint of the instruction as to the measure of damages is without merit. The law as given by the court on this feature of the case is found in instruction No. 4, which is as follows:

"The Court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the
142 said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, or other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition. And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of

her dependency, if any, as the widow of decedent and, in no event, for a longer period than her said husband would have probably lived but for the injury complained of and in question. The Court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

The measure of damages as given in the above instruction is substantially the same as that contained in the instruction given in the case of C. & O. Ry. Co. v. Kelly's Adm'x, supra, which received our approval in that case. It will be observed that the instruction
143 did not, as claimed by appellant's counsel, require the jury to find for the decedent's administratrix the aggregate sum of his earning capacity during the life expectancy, but limited the recovery, so that it could not exceed the actual pecuniary loss which the widow sustained by the decedent's death, or in any event exceed the amount claimed in the petition, $40,000.00, which is, itself, less than the evidence showed the decedent's earning capacity would have been during such expectancy.

The record furnishing no reason for the reversal asked, the judgment is affirmed.

Proctor K. Malin, Ashland, Ky.; Worthington, Cochran & Browning, Maysville, Ky., for appellant.

R. S. Dinkle, Catlettsburg, Ky.; Watt M. Prichard, Catlettsburg, Ky.; Geo. B. Martin, Catlettsburg, Ky., for appellee.

[Endorsed:] Jan. 29, 1915. C. & O. v. Dwyer.

144 Afterwards, to-wit, on the 26th of February, the appellant filed its Petition for Rehearing herein in words and figures following, to-wit:

145 Court of Appeals of Kentucky.

THE CHEAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
v.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Appeal from Boyd Circuit Court.

Petition for Rehearing.

May it Please the Court:

The opinion rendered herein, to which this petition for
146 rehearing is directed, is reported in 162 Ky. 427.

The grounds for rehearing are as follows:

By reason of the provisions of the Seventh Amendment to the Constitution of the United States, jurisdiction of the cause of action herein asserted could not be conferred upon the Boyd Circuit Court, or in any way acquired by it.

It will be borne in mind that this action is one arising under the Federal Employers' Liability Act (35 Statutes at Large 65); that the right asserted in it is one created by and dependent solely upon that Act, the Federal legislation upon the subject of injuries to employes of carriers engaged in interstate commerce having superseded all other. There is no right on account of personal injury which such an employe has against such an employer other than is provided by the Act, nor can any right thereby created be enforced in any other manner than that herein prescribed.

By the sixth section of the Act as amended by the Act of April 5, 1910, (36 Statutes at Large, 291,) it is provided that:

"The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states."

The Seventh Amendment to the Federal Constitution provides that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be pre-
147 served, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

It will, of course, be recognized at once that this Amendment consists of two independent clauses, the first providing for the preservation of the right of trial by jury in all suits at common law where the value in controversy exceeds twenty dollars, and the second providing that after a jury shall have passed upon a question of fact, it shall not be otherwise re-examined in any court of the United States than according to the rules of the common law. It is the first of these clauses with which we have to do here.

The right of trial by jury, which this Amendment declares "shall be preserved," is the right to a trial by a jury of twelve men, whose finding shall be unanimous:

American Publishing Co. v. Fisher, 166 U. S. 464, 41 L. Ed. 1079.

In Springville City v. Thomas, 166 U. S. 707, 41 L. Ed. 1173, the Supreme Court, speaking through Mr. Justice Fuller, said:

"In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases; and the Act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

In Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 41 L. Ed. 841, Justice Brewer, speaking for the court, said:

"The Seventh Amendment, indeed, does not attempt to
148 regulate matters of pleading or practice. * * * Its aim is not to preserve mere matters of form and procedure, but substance of right."

In the Fisher case, supra, the same Justice again, speaking for the court, said (166 U. S. 468, 41 L. Ed. 1081:)

"Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right."

We therefore submit that "the right of trial by jury" (that is, a trial by a jury of twelve, whose verdict shall be unanimous,) which the Seventh Amendment declares "shall be preserved," necessarily inheres in every cause of action created by or originating under an Act of Congress; and that the Congress cannot confer upon any court, nor can any court otherwise obtain jurisdiction to try such causes of action, unless it be so constituted as to afford the trial required by the Seventh Amendment.

Now the Constitution of Kentucky, Section 248, provides that:

"The General Assembly may provide that in any or all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel;"

and Section 2268, Kentucky Statutes, which carried into effect the above constitutional provision, provides that,

"In all trials of civil actions in the circuit courts, three-
149 fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel."

Neither Section 248, of the Constitution of Kentucky, nor the above legislation passed in pursuance thereof, are forbidden by the first clause of the Seventh Amendment to the Federal Constitution, which is a limitation upon the power of Congress and not a limitation upon the legislative power of the state, and the state legislation upon this subject being entirely valid as to procedure in its courts, it is clear that no circuit court in Kentucky can enforce the common-law requirement as to a unanimous verdict by twelve men, or can refuse to receive a verdict rendered by nine, which is not amenable to some other legal objection.

Now in all cases where the Congress can confer concurrent jurisdiction upon state and Federal courts, it can, if it see fit, confer the jurisdiction exclusively upon the state courts. The right of trial by jury, however, as that term is used in the Seventh Amendment, is one which Congress may not take away or even abridge; but if it could create rights and liabilities and commit their enforcement exclusively to courts powerless to enforce the constitutional mandate as to mode of trial, then a right secured to a litigant by the Federal Constitution would be held at the mere will of the Federal legislation; a conclusion which, of course, is absurd.

It would seem, therefore, to follow that the courts of a state which are powerless to satisfy the requirements of the Seventh Amendment cannot entertain jurisdiction of a cause of action created by, and

wholly dependent upon, an Act of Congress; they cannot
150 acquire jurisdiction of the "subject matter of the action."

Indeed, it is fairly questionable whether it was intended by Congress to confer jurisdiction upon such courts. The Amendment to Section 6 of the Employers' Liability Act is as follows (italics ours:)

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several states, and no cases arising under this Act and brought in any state court of *competent* jurisdiction shall be removed to any court of the United States."

And in Section 28 of the Act of March 3, 1911, known as the Judicial Code, it is again provided that no case arising under the Employers' Liability Act

"brought in any state court of competent jurisdiction shall be removed to any court of the United States."

This language in both statutes seems to imply a purpose to confine the jurisdiction, as to the state courts, to those of "competent jurisdiction" only; and, as we have seen, no court can be said to be "competent" for the adjudication of a purely Federal right or liability which is not equipped with the power to afford the kind of trial required by the Federal Constitution.

The argument may be thus concisely summarized: The Seventh Amendment provides for the preservation of the right of trial in
common-law cases by the unanimous verdict of a jury of
151 twelve; this is not a mere matter of procedure or form, but, as declared by the Supreme Court in Walker v. N. M. & S. P. R. Co., supra, one of "substance of right;" while this is not a limitation upon the power of the states, it is a limitation upon the power of the Federal Government to provide any other mode of trial for such cases; if Congress can create rights and impose liabilities, which, by reason of their nature must be enforced by "suits at common law," and provide for their adjudication otherwise than by "trial by jury," it can set aside at pleasure the constitutional requirement, which is absurd; and if it undertakes to commit the adjudication of such rights and liabilities to tribunals which are organically incapable of affording such a jury trial, such undertaking does involve an attempt to provide another mode of trial than that required by the Federal Constitution. The court, therefore, should not, unless compelled by necessary principles of statutory construction, interpret the Congressional legislation in question as intending to commit to those state courts, which are unable to satisfy the requirements of the Seventh Amendment, the adjudication of the rights created, and the liabilities imposed, by it; but if it be necessary to construe it as evidencing such purpose, the legislation should, in that particular, be declared unconstitutional and void.

We deem it unnecessary to argue the proposition that this question of jurisdiction of the subject-matter is one that cannot be waived, but, until the final disposition of the cause, may at any time be raised by the parties and should be raised by the court itself whenever presented to its notice. See:

Ormsby v. Lynch, Litt. Sel. Cases, 307.

152 Lindsey v. McClelland, 1 Bibb 263.

Fidler v. Hall, 2 Met. 461, 463.

Davidson v. Johnson, 113 Ky. 210.

Mansfield C. & L. M. R'y v. Swan, 111 U. S. 379, 382, 28 L. Ed. 462, 464.

Metcalf v. City of Watertown, 128 U. S. 586, 587, 32 L. Ed. 543.

We ask that a rehearing be granted; that the judgment appealed from be reversed, and, as was done in Fidler v. Hall, supra, that the cause be remanded with a direction to the Boyd Circuit Court to dismiss the action.

Respectfully submitted,

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN & BROWNING,
Counsel for Appellant.

153 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky on March 26, 1915, the following order was entered, to-wit:

C. & O. Ry. Co.
vs.
Dwyer's Adm'x.

Boyd.

The court being sufficiently advised ordered that the petition for rehearing herein be and the same is now overruled.

On the same day, to-wit, March 26, 1915, the following Mandate was issued on the judgment of affirmance herein:

The Commonwealth of Kentucky:

The Court of Appeals, January 29, 1915.

Chesapeake & Ohio Railway Company, Appellant,
against
Richard Dwyer's Administratrix, Appellee.

Appeal from a Judgment of the Boyd Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount of the judgment superseded herein.

Which is ordered to be certified to said Court.

ROBT. L. GREENE, C. C. A.,
By A. ADDAMS, *D. C.*

154 Afterwards on the 5th day of April, 1915, the appellant and plaintiff in error filed in the Clerk's office of the said Court of Appeals its Petition for Writ of Error, which is in words and figures, following, to-wit:

155 Court of Appeals of Kentucky.

CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
v.
SARAH DWYER, as Administratrix of Richard Dwyer, Deceased, Appellee.

Petition for Writ of Error.

The petitioner, The Chesapeake and Ohio Railway Company, appellant herein, hereby sets forth that on or about the 29th day of January, 1915, the Court of Appeals of the State of Kentucky made and entered an order and judgment herein in favor of the appellee, Sarah Dwyer, as administratrix of the estate of Richard Dwyer, deceased, and against said petitioner, the appellant; that afterwards, and within the time allowed by the law of the State of Kentucky, appellant filed a petition for a rehearing in said cause, and thereby, and under the laws of the State of Kentucky and the rules of said court, the said order and judgment was suspended and did not become final until the Court of Appeals acted upon said petition for a rehearing; that afterwards, on the 26th day of March, 1915, the said petition for a rehearing was overruled by the said Court of Appeals, and its said judgment and order, made, as aforesaid, on or about the 29th day of January, 1915, became final and the mandate of said Court of Appeals was, upon said day, duly issued thereon; that in said order and judgment and the proceedings had
156 prior thereunto in this cause certain errors were committed to the prejudice of said petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition:

That the said Court of Appeals of the State of Kentucky is the highest court of the said State of Kentucky in which a decision in this suit and this matter could be had.

Wherefore said petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Court of Appeals of the State of Kentucky for the correction of the errors so complained of, and that a transcript of the record, pro-

ceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 1st day of April, 1915.

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN & BROWNING,
Attorneys for said Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 5th day of April, A. D. 1915; the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of twenty-five ($25,000.00) thousand Dollars.

Dated at Frankfort, Kentucky, this 5th day of April, A. D. 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

157 On the same day, to-wit April 5, 1915, the plaintiff in error filed in said Clerk's office its Writ of Error, which is in words and figures following, to-wit:

158 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Kentucky, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Chesapeake and Ohio Railway Company, Appellant, and Sarah Dwyer, as Administratrix of the estate of Richard Dwyer, deceased, Appellee, wherein was drawn into question the validity of a statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said statute, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of The Chesapeake and Ohio Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme

159 Court of the United States, together with this writ, so that you have the same at Washington, thirty days after the date

hereof, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, and the seal of the District Court of the United States, for the Eastern District of Kentucky, at Frankfort, this the 5th day of April, 1915.

[Seal United States of America, Eastern K't'y Dist. Court.]

JNO. W. MENZIES,
Clerk of the United States District Court
for the Eastern District of Kentucky,
By CHAS. N. WIARD, *D. C.*

Allowed by:
SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

160 At the same time, to-wit, April 5th, 1915, said plaintiff in error filed in said Clerk's office its Assignment of Errors in words and figures following, to-wit:

Court of Appeals of Kentucky.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
v.
SARAH DWYER, as Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Assignment of Errors.

Now comes the said appellant, the plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Kentucky, in the above entitled cause, there is manifest error in this, to-wit:

First. The said court erred in holding and deciding that the Boyd Circuit Court, from whose judgment the appeal was prosecuted to the said Court of Appeals, had jurisdiction of the subject matter of this action, and in refusing to reverse said judgment and remand this action to the said Boyd Circuit Court with directions to dismiss same.

Second. The said court erred in refusing to hold that by reason of the provisions of the 7th Amendment to the Constitution of the United States, jurisdiction of the cause of action herein asserted could not be conferred upon the Boyd Circuit Court, or in any way acquired by it.

Third. The said court erred in refusing to hold that by reason of its inability under the laws of the state of Kentucky, to grant a jury trial by an unanimous jury of twelve, the Boyd Circuit Court

was not a court of competent jurisdiction with- the provisions of the Federal Employers' Liability Act, and Section 28 of the Act
161 of Congress of March 3, 1911, known as the Judicial Code.

Fourth. The said court erred in holding and deciding that the said Boyd Circuit Court had committed no error in giving to the jury instruction No. 4, which was in words and figures as follows:

"The court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

The Court instructs the jury that they can not allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death.

Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of
162 the death of the decedent, Richard Dwyer."

Said instruction being erroneous for the following reasons:

(*a*) While the jury were thereby authorized to take into consideration in estimating the damages, certain facts, such as the decedent's age, habits, business abiliy, earning capacity, and probable duration of life, all of which went to enhance the amount of damage, they were not told that they might take into consideration his health, his physical condition and the hazardous nature of the employment in which he was engaged, which were circumstances tending to decrease the estimate of damage.

(*b*) Said instruction does not confine the amount of recovery to the present cash value of the reasonable expectation of pecuniary advantage to the dependent from a continuance of the life of the decedent, but permits the jury to estimate such pecuniary advan-

tage as being equal to the probable earnings of said decedent during the whole period of his life expectancy.

(*c*) Said instruction does not confine the amount of recovery within the limits of the net value of the probable earnings of the decedent during his expectation of life, after deducting from his total probable earnings the reasonable cost of his own living and maintenance.

(*d*) Said instruction does not confine the amount of recovery to the pecuniary loss sustained by the widow but permits the jury to take into consideration matters and circumstances improper for their consideration.

(*e*) Said instruction does not limit the recovery to the pecuniary loss sustained by the widow.

163 Wherefore, the said appellant, plaintiff in error, prays that a writ of error from the Supreme Court of the United States may issue to the Court of Appeals of the State of Kentucky, and further prays that the Supreme Court of the United States will reverse the said final order and judgment of the Court of Appeals of the State of Kentucky, and order and direct that the said cause be remanded to the Boyd Circuit Court of said state of Kentucky with directions to dismiss said action, and to grant to the plaintiff in error all such other relief as may be proper.

Dated this 5th day of April, 1915.

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN & BROWNING,
Counsel for Plaintiff in Error.

164 At the same time said plaintiff in error filed in said Clerk's office its Writ of Error Bond, which is in words and figures, to-wit:

165 Court of Appeals of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, as Administratrix of Richard Dwyer, Deceased, Appellee.

Bond.

Know All Men by These Presents:

That we, The Chesapeake & Ohio Railway Company, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Sarah Dwyer, as administratrix of the estate of Richard Dwyer, deceased, in the sum of Twenty Five Thousand Dollars, to be paid to the said obligee, her successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

In testimony whereof we have hereunto subscribed our names this 5th day of April, A. D. 1915.

Whereas, the above named The Chesapeake & Ohio Railway Company, hath prosecuted, as plaintiff in error, a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of the state of Kentucky.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damage, if it shall fail to make good its plea, then this obligation shall be void, but otherwise to remain in full force and effect.

166 THE CHESAPEAKE & OHIO RAILWAY COMPANY,
By W. D. COCHRAN, *Attorney.*
UNITED STATES FIDELITY & GUARANTY COMPANY,
By C. W. HAY, *Attorney in Fact.* [SEAL.]

STATE OF KENTUCKY,
County of Franklin, sct:

I, W. S. Sandifer, a Notary Public within and for the above named county and state, certify that on this day and in said county and state, the foregoing instrument was produced to me, and was acknowledged by W. D. Cochran, attorney of the above named The Chesapeake & Ohio Railway Company, for and on behalf of said Railway Company, to be its act and deed.

Given under my hand and seal this 5th day of April 1915. My commission expires — day of ——, 19—.

[SEAL.] W. S. SANDIFER,
Notary Public.

Notary Public of Franklin Co., Ky.
My commission expires at the end of the next Session of the Senate.

STATE OF KENTUCKY,
County of Franklin, sct:

I, W. S. Sandifer, a Notary Public within and for the above named county and state, certify that on this day and in said county and state, the foregoing instrument was produced to me, and was acknowledged by C. W. Hay, attorney in fact of the above named United States Fidelity & Guaranty Company, for and on behalf of said United States Fidelity & Guaranty Company, to be its act and deed.

167 Given under my hand and seal this 5th day of April, 1915. My commission expires — day of ——, 19—.

[SEAL.] W. S. SANDIFER,
Notary Public.

Notary Public of Franklin Co., Ky.
My commission expires at the end of the next Session of the Senate.

I hereby approve the foregoing bond and surety, this 3rd day of April, A. D., 1915.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

168 Afterwards, to-wit, on the 8th day of April, 1915, said plaintiff in error filed the Citation with service endorsed thereon, which Citation is in words and figures following, to-wit:

169 UNITED STATES OF AMERICA, *ss:*

To Sarah Dwyer, as administratrix of Richard Dwyer, deceased:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the state of Kentucky, wherein The Chesapeake and Ohio Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Shackelford Miller, Chief Justice of the Court of Appeals of Kentucky, this 5th day of April, in the year of our Lord one thousand nine hundred and fifteen.

SHACKELFORD MILLER,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
ROBT. L. GREENE,
Clerk Court of Appeals of Kentucky,
By T. M. JONES, *D. C.*

Copy of the above citation received, and service of said citation hereby acknowledged this 6" day of April, A. D. 1915.

R. S. DINKLE,
WATT M. PRICHARD,
GEO. B. MARTIN,
Attorneys for Defendant in Error.

Also at the same time received copy of writ of error and bond.

R. S. DINKLE,
WATT M. PRICHARD,
GEO. B. MARTIN.
Attorneys for Defendant in Error.

170 At the same time, to-wit, April 8, 1915, said plaintiff in error filed its Praecipe, which is in words and figures following, to-wit:

171 Court of Appeals of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, as Administratrix of Richard Dwyer, Deceased, Appellee.

Præcipe of Appellant (Plaintiff in Error).

In conformity of Rule Eight of the rules of the Supreme Court of the United States, and in order for the preparation of the transcript of the record upon the writ of error from said Supreme Court to the Court of Appeals of Kentucky, the above named The Chesapeake & Ohio Railway Company, appellant in said Court of Appeals, indicates the following as the portion of the record in this action to be incorporated into the transcript of the record on said writ of error, to-wit:

1st. The preamble on page 3 of the record on the first appeal.

2nd. The plaintiff's petition, on pages 3 to 7 of the record on the first appeal.

3rd. The answer of defendant, and order noting same, on pages 13 to 17 of the record on the first appeal.

4th. The reply of plaintiff, and the order noting same on pages 17 to 19 of the record on the first appeal.

5th. Order of March 19, 1913, noting the commencement of the trial and empanelling of the jury, on page 19 of the record on the first appeal.

172 6th. The judgment of the Boyd Circuit Court, rendered on the 20th. day of March, 1913, on page 20 of the record on the first appeal.

7th. The order of March 21, 1913, noting motion and grounds for a new trial, the order overruling the motion and grounds for a new trial, and granting an appeal to the Court of Appeals, and extending time for filing of bill of exceptions, on page 21 of the record on first appeal.

8th. The motion and grounds for new trial, on pages 21 and 22 of the record on the first appeal.

9th. The order noting filing of bill of exceptions, on pages 22 to 23 of the record on first appeal.

10th. The judgment of the Court of Appeals of Kentucky, reversing the judgment of the Boyd Circuit Court, on the first appeal herein, and opinion of the court of Appeals of Kentucky rendered on said first appeal, and the mandate of the Court of Appeals of Kentucky issued upon the judgment entered on said first appeal.

11th. The amended petition of plaintiff, filed on the 23rd. day of June, 1914, and the order noting the filing of same, on pages 25 to 27 of the record on the second appeal.

12th. The order of June 24th., 1914, noting the filing of the mandate of the Court of Appeals, on page 28 of the record on the second appeal.

13th. The order of June 24th., 1914, traversing the plaintiff's amended petition, on page 30 of the record on the second appeal.

14th. The order of June 24, 1914, noting the commencement of the trial and empannelling of the jury, on page 30.

173 15th. The order and judgment of date June 25, 1914, on pages 31 to 32 of the record on the second appeal.

16th. The order of June 26, 1915 noting the motion and grounds for new trial, and said motion and grounds for new trial, on pages 32 to 33 of the record on the second appeal.

17th. The order of July 3, 1914, overruling the motion and grounds for a new trial, and granting an appeal to the Court of Appeals, on pages 34 to 35 of the record on the second appeal.

18th. The order of July 3, 1914, extending time for filing of bill of exceptions, on page 35 of the record on second appeal.

19th. The order of September 11, 1914, extending time for filing of bill of exceptions, on page 36 of the record on second appeal.

20th. The order filing and approving the bill of exceptions, on page 37 of the record on the second appeal.

21st. The defendant's bill of exceptions, on pages 39 to 157 of the record on the second appeal.

22nd. The judgment of affirmance and opinion of the Court of Appeals of Kentucky, on the second appeal of this cause.

23rd. The petition for rehearing filed by Appellant on the second appeal of this cause, and the response or order overruling petition for rehearing delivered by the Court of Appeals, and the mandate of the said Court of Appeals, upon the second appeal of this case.

24th. The petition for writ of error, the writ of error, and allowance of same, the assignment of errors, the writ of error bond, the citation and return of service of same, this præcipe, and

174 the return of service of same.

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN & BROWNING,
Counsel for Above-named Appellant, Plaintiff in Error.

Copy of the above præcipe received, and service of same hereby accepted and acknowledged, this 6th. day of April, 1915.

R. S. DINKLE,
MATT M. PRICHARD,
GEO. B. MARTIN,
Attorneys for Defendant in Error.

175 Afterwards, to-wit, on the 13th day of April, 1915, said defendant in error filed its Præcipe, which is in words and figures following, to-wit:

176 Court of Appeals of Kentucky.

CHEASAPEAKE & OHIO RAILWAY COMPANY, Appellants,
against
SARAH DWYER, as Administratrix of Richard Dwyer, Deceased, Appellee.

Præcipe of Appellee (Defendant in Error).

In pursuance of Rule Eight (8) of the rules of the Supreme Court of the United States, the above named Sarah Dwyer as Administratrix of the estate of Richard Dwyer, deceased, appellee in said Court of Appeals, indicates the following additional portions of the record to be incorporated into the transcript of the record on the writ of error herein, to-wit:

First. The brief of the appellant, Chesapeake & Ohio Railway Company, on the first appeal herein.

Second. The brief of the appellant, Chesapeake & Ohio Railway Company, on the second appeal herein.

Third. This præcipe and the acknowledgment of service thereof.

R. S. DINKLE,
MATT M. PRICHARD,
GEO. B. MARTIN,
Counsel for Above-named Appellee (Defendant in Error).

Service of copy of above præcipe acknowledged and accepted. This April 8th, 1915.

PROCTOR K. MALIN,
Counsel for Appellant (Plaintiff in Error).

177 Court of Appeals of Kentucky.

No. 278.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellant,
v.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Brief for Appellant.

Statement.

May it Please the Court: On the 12th day of May, 1910, the appellee's intestate, an engineer in the employment of the appellant, was killed as the result of the derailment of a part of the train upon which he was at the time employed. The scene of the accident was at England Hill, in Boyd County, Kentucky, upon the Big Sandy division of appellant's railroad. The train in question was a freight,

and, at the time of the accident, was being hauled by two engines; the decedent was the engineer upon the second engine.

178 At the place where the accident occurred, the railroad tracks are located in a cut, the sides or banks of which are several feet in height. The cause of the accident was a landslide, or rather slip, upon the side of the cut, which caused rock and earth to be deposited upon the track. When decedent's train struck this deposit of dirt and rock, the two engines were derailed, and decedent received injuries which shortly afterwards resulted in his death.

The derailment occurred at about 1:30 on the morning of May 12, 1910. Presumably the dirt and rock fell upon the track within a few hours of the accident, as a section crew passed over this portion of the track late in the preceding afternoon and saw no indications of any trouble. The decedent, being in the second engine, apparently did not know of the presence of the debris upon the track until about the time of the derailment. The engineer upon the leading engine did not discover the danger until it was too late to stop the train. It was raining at the time of the accident and had been for some time prior thereto.

This action was instituted by the appellee as administratrix of the estate of the decedent, and a recovery sought under the Employers' Liability Act of Congress, approved April 22, 1908, as amended by the act of April 5, 1910, the petition alleging the facts necessary to bring the suit within the purview of the federal act. The following grounds of negligence were relied upon in the petition, first, negligence of the employes in charge of the train; second, failure of the appellant (defendant) to equip the engines with sufficient headlights; and third, negligence of the appellant in failing to take the proper precautions to prevent the fall of debris upon the railroad track at the place in question. Upon the trial of

179 the case, the first two grounds of alleged negligence were abandoned, appellee relying only upon the third ground. In support of the allegations of negligence in this latter respect, testimony was introduced which tended to show that for sometime prior to the accident, the side of the cut had been in a more or less dangerous condition because of the presence of overhanging rocks and loose dirt. Appellant's testimony was to the effect that the side of the cut gave no indication of danger, or of the probability of a slide, and that the accident could not have been anticipated or prevented.

Upon the trial of the case a verdict was returned in favor of appellee for the sum of $14,000.00, and judgment was rendered accordingly. Motion and Grounds for a new trial having been filed and overruled, this appeal was prayed.

I.

Argument.

Upon the question as to the measure of damages the trial court gave to the jury the following instruction (see page 119, record):

"The jury are instructed that if they should find for the plaintiff, then they will from the evidence find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate the estate of the decedent, Richard Dwyer, for the destruction of his power to earn money, caused by his death, not exceeding, however, the sum of $40,000.00, the amount claimed in the petition."

The above instruction, while stating the measure of damages applicable to actions brought under the Kentucky death statute (section 6, Ky. Stats.) is not applicable to suits brought under the Employers' Liability Act of Congress. In actions for death instituted under this latter act, the damages authorized to be
180 awarded are not to compensate the estate of the deceased employe for the destruction of his power to earn money, but only to compensate the surviving relatives of the deceased for the actual pecuniary loss resulting to the particular person, or persons, for whose benefit the statutory right of action is given. The character of the liability imposed by the act of Congress, and the measure of recovery thereunder, has been definitely and decisively settled by a number of recent decisions of the Supreme Court of the United States.

The question here presented was first discussed and settled by the Supreme Court in the case of Michigan Central Railroad Company v. Vreeland, 227 U. S. 59, 57 L. Ed. (decided Jan. 20, 1913), which was an action brought under the federal act for the benefit of the widow of an employe who was killed while engaged in interstate commerce. In the course of an exhaustive opinion by Mr. Justice Lurton, it is said:

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employe wrongfully injured, for the loss or damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds—'or in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death', etc." * * *

"This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by

relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only."

"The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being,—that of 9 and 10 Vict. chap. 93, known as Lord Campbell's act. This act has been, in its distinguishing features, re-enacted in many of the states, and both in the
181 courts of the states and of England, has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death." * * *

"The word, 'pecuniary' did not appear in Lord Campbell's act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

"A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of that loss to the beneficial plaintiffs, which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.' Patterson, Railway Acci. Law, Sec. 401."

It will thus be seen that it was definitely settled by the above decision, that in an action under the statute for the death of an employe, the measure of recovery was the pecuniary loss resulting to certain dependent members of the family of the decedent, and that only.

So, in the case of American Railroad Company of Porto Rico v. Didrickson, 227 U. S., 145, 57 L. Ed. , (decided January 27, 1913), in the course of the opinion, also by Mr. Justice Lurton, it is said:

"There was error in the rule for measuring the damages recoverable.

"The cause of action which was created in behalf of the injured employe did not survive his deatth, nor pass to his representatives. But the act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employe. The damage is limited strictly to the financial loss thus sustained."

182 Still more recently in the case of Gulf, Colorado & Santa Fe Railway Company v. McGinnis, 228 U. S., 173, 57 L. Ed. — (decided April 7, 1913), which, like the case at bar, was an

action instituted by the widow as administratrix for the benefit of the widow and children the court said:

"In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employe for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss." * * *

"The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

See, also, St. Louis, Iron Mountain & Southern Ry. Co. v. Hesterly, 228 U. S., 702, 57 L. Ed., (decided May 26, 1913).

Furthermore, this exact question was met and decided by this court in the case of Illinois Central Railroad v. Doherty's Adm'r, 153 Ky., 363, wherein it was said:

"It is clear that the act does not like the Kentucky statute applicable to similar cases, allow a recovery merely to compensate the estate of the decedent for his death and the consequent destruction of his power to earn money, but provides that only those naturally or actually dependent upon the decedent shall take the benefit of the recovery. It, therefore, expressly limits the right of recovery to cases in which only the person or persons sustaining pecuniary loss by the decedent's death are entitled to be compensated, viz: the beneficiaries named, in the order named. This being so, it necessarily follows, that in an action under the act of Congress if there is no one for whom a recovery can be had, there can be no recovery. Proof must, therefore, be made of the existence of such surviving beneficiary or beneficiaries; and, if necessary to be proved as an element essential to a recovery, it is an issuable fact that must be alleged. So, if the petition in such an action fails to allege that the decedent is survived by a person or persons coming within the indicated limitation, it is bad on demurrer."

183 It will be seen from the above quoted excerpt from the opinion of Judge Settle, that this court has expressly held that in actions brought under the federal act, the recovery is not "to compensate the estate of the decedent for his death and the consequent destruction of his power to earn money."

And this is necessarily so, for, "the damage to the estate, and the measure of recovery therefor, are essentially different from the pecuniary loss or injury to the dependent relatives because of the death of the employe, and the measure of recovery therefor." See Thomas v. Chicago, etc. Ry. Co., 202 Fed. 766.

That the distribution of the damages recoverable under the federal act for the death of an employe while engaged in interstate commerce, is governed by the provisions of that act, and that

act alone, is no longer an open question. In the field covered by the terms of the act of Congress, that act is supreme and supersedes all state legislation. See Illinois Cent. R. Co. v. Doherty, supra; Michigan Cent. R. Co. v. Vreeland, supra; Missouri, K. & T. R. Co. v. Wulf, 226 U. S., 570, 57 L. Ed.—; Second Employers' Liability Cases, 223 U. S., 1, 56 L. Ed. 327.

We submit that the instruction in question was clearly erroneous, and that for this reason, the judgment of the Boyd circuit court should be reversed and the cause remanded.

——— ———,
Counsel for Appellant.

184 *Authorities Cited.*

Michigan Cent. Railroad Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. —, (decided Jan. 20, 1913).
American Railroad Co. of Porto Rico v. Didrickson, 227 U. S. 57 L. Ed. —, (decided Jan. 27, 1913).
Gulf, Colorado & Sante Fe Ry. Co. v. McGinnis, 228 U. S. 173, 57 L. Ed. —, (decided April 7, 1913).
St. Louis &c. Ry. Co. v. Hesterly, 228 U. S., 702, 57 L. Ed. —, (decided May 26, 1913).
Illinois Cent. R. Co. v. Doherty's Adm'r, 153 Ky. 363.
Thomas v. Chicago &c. Ry. Co., 202 Fed. 766.
Illinois Cent. R. Co. v. Doherty, supra.
Michigan Cent. R. Co. v. Vreeland, Supra.
Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. Ed. —.
Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed., 327.

185 Court of Appeals of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Appellee.

Brief for Appellant.

May it please the Court:

This is the second appeal of this case, the opinion upon the former appeal being reported in 157 Ky. 590, 163 S. W. 752, wherein the facts of the case as developed by the proof are so fully stated as to make any restatement herein unnecessary.

The case having been redocketed in the Boyd Circuit Court, upon the second trial of the same, a verdict signed by nine of the jurors, was returned in favor of the appellee (plaintiff) judgment being rendered accordingly, and from that judgment this appeal is now prayed. The grounds relied upon for reversal are as follows:

I.

The Verdict is Grossly Excessive.

As appears from the amended petition filed after the redocketing of the case in the lower court, and from the proof introduced, the only beneficiary herein is the widow of the decedent, who is also the administratrix of his estate and the plaintiff in this action.

In as much as the action is brought under the Federal Em-
186 ployers' Liability Act, and as the widow is the only beneficiary, it follows that any recovery must be confined to the pecuniary loss sustained by the widow as the result of the death of the decedent. In other words, the measure of damages is not the loss to decedent's estate as the result of his death, but the pecuniary loss or damage sustained by appellee herself. See opinion on former appeal and cases therein cited,—and in particular Ill. Cent. R. Co. v. Doherty's Adm'r 153 Ky., 363, 155 S. W. 1119, and Mich. Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. Ed. 417.

In determining whether or not the verdict herein is excessive we can consider only the damage sustained by the appellee herself, and not the damage sustained by the decedent's estate.

It appears from the testimony of Mrs. Dwyer that her husband, at the time of his death was 45 years of age, was an engineer in appellant's service, and was making about $160.00 per month. The decedent had in the course of his life accumulated between $600.00 and $700.00, which was invested in a home in Ashland. Appellee and her husband had two children,—a boy and a girl,—the former being self-supporting at the time of his father's death, and the latter being married, neither being a dependent, as has been above stated. The appellee herself was 43 years of age at the time of her husband's death.

We submit that any reasonable method of calculation will show that under the above facts and circumstances the verdict is grossly excessive and far greater than any pecuniary loss that appellee could possibly have sustained.

As we have seen the decedent, though 45 years old at the time of his death, had accumulated only $600.00 or $700.00. It is not reasonable to presume that his accumulations during the
187 remainder would be much greater. Moreover, it is almost a certainty that his earning capacity would, in a few years, have been materially decreased. We particularly call attention to these facts for they, of necessity, have a bearing upon the question of the loss sustained by appellee.

Now, even if it should be assumed that the decedent's earning capacity, as it was at the time of his death, would have continued unimpaired, and that he would have lived out his expectancy of approximately twenty-four years, yet the verdict is in excess of any loss that could in reason have been sustained by appellee. His earnings at his death were about $1,900.00 per year. If we deduct his personal expenses and expenditures therefrom, it is not likely that Mrs. Dwyer would have received more than half of his earn-

ings, or $950.00 per year. Yet the amount of the verdict, to-wit, $16,000.00, will at 6% interest, yield that much of an income annually, and yet leave her the principal unimpaired to dispose of at the time of her death. In other words, in order to reach the conclusion that the verdict is reasonable, we must assume that decedent would have continued earning as much as he was for the rest of his natural expectancy, that his wife would have received half of his earnings, and that, in addition, he would have accumulated a sufficient amount to have enabled her to have received $16,000.00 at his death. But all the above assumptions are beyond the range of probabilities. In the first place, in view of the fact that decedent up to the time of his death had been able to accumulate only six or seven hundred dollars, it would be absurd to assume that he might thereafter have accumulated sixten thousand dollars,
188 or anything approximating that sum. It would be equally absurd to assume that his earning capacity would have continued unimpaired throughout the remainder of his natural life expectancy. There is no reasonable argument upon which can be based the proposition that Mrs. Dwyer's pecuniary loss amounted to $16,000.00. Moreover, even if we assume that Mrs. Dwyer would have continued to receive each year for the rest of her husband's expectancy, one half of what he was making at the time of his death, yet the present cash value of what she would thus have received would have been less than $14,000.00. And if we take into consideration the certainty that the decedent's earning capacity would soon have been materially lessened because of his increasing age, then the verdict becomes even more disproportionate to the loss sustained. Thus, if it is assumed that Mrs. Dwyer would have received an average amount of $750.00 per year from the earnings of decedent throughout his expectancy, the cash value thereof would be $11,000.00. Or taking the figure of $500.00 per year, we have a present cash value of approximately $7,300.00. At $350.00 per year, the cash value would be slightly over $5,000.00.

Necessarily, in the assessment of damages in a case like this, much must be left to speculation. But there are certain facts that human experience conclusively establishes. A man engaged in the employment that decedent was can not but lose a large percentage of his earning capacity very soon after reaching the age of 45. Nor is it likely that decedent would have been able to accumulate and lay aside any considerable sum, especially considering the fact that he had not already done so, and that his power to earn money would have decreased with advancing years. The case at bar is not complicated by the presence of dependent children. The widow was the only dependent, and was herself middle aged. We submit that under all the circumstances, the verdict was grossly excessive, and is proven to be to a mathematical certainty.

189 We, of course, know that the Employers' Liability Act was framed in an attempt to alleviate the suffering that was resulting from industrial accidents; and was intended to give the recovery to those only who stood in need of it. We can not help but feel that, in view of the liberality of its provisions, the courts

should closely supervise the verdict- of juries, and unhesitatingly set aside those verdicts when they are plainly in excess of the loss that has actually been sustained. In fact, we believe that a consideration of the cases wherein the courts have been called upon to consider the reasonableness of the jury's verdict, will show that there is a tendency to closely scrutinize the jury's finding. Thus a $15,000.00 verdict for the loss of an arm and material injury to health, the injured person being 24 years of age, was reduced to $12,000.00 in Bradbury v. Chicago, Etc. Ry. Co. (Iowa) 128 N. W. 1. And a verdict for $17,545.00 for the death of a young man 19 years old, who was contributing over $400.00 to the support of his family at the time of his death, was reduced to $6,000.00.—see Duke v. St. Louis, Etc., Ry. Co., 172 Fed. 684. See also Cain v. Southern Ry. Co. 199 Fed. 211; St. Louis, Etc. Ry. Co. v. Hesterly (Ark.) 135 S. W. 874; Neil v. Idaho &c. Ry. Co. (Idaho) 125 Pac. 331.

It is earnestly submitted that the verdict is excessive and that for this reason the judgment should be reversed.

The Instruction on the Measure of Damages is Erroneous.

The instruction given by the trial court defining the measure of damages tells the jury that they should not award any sum in excess "of the aggregate probable earnings of the dec-dent." This, in effect, authorized the award of a sum equal to the "aggregate probably earnings" of decedent, which, we submit, is erroneous. There is no contention that appellee was receiving, or would have received, the total earnings of decedent. It was necessary,
190 and would have continued to be necessary, for decedent to have retained out of his earnings a sufficient amount to meet his personal expenses and even if he had given the remainder of his earnings to his wife, the amount so given would not have been his "aggregate probable earnings." The appellee was entitled to only such sum as would have compensated her for her actual pecuniary loss. That loss could not have equalled the aggregate earnings of decedent, and therefore, it was improper to advise the jury that they could make an award equal to the probable amount of such earnings. The plain meaning of the above quoted part of Instruction No. 4 was to authorize the jury to award a sum in damages by multiplying decedent's earning capacity by his life expectancy. In Stewart's Adm'r v. L. & N. R. R. Co. 136 Ky. 717 this court held that such a method of computation of damages was improper, saying:

" * * * It does not follow that this is to be computed by simply multiplying the earning power of the deceased at his death by his expectancy of life as shown by the life tables. * * * The value of a piece of machinery is not to be determined by multiplying its present earning power by the length of its probable use, but the cost of maintenance must be subtracted. The value of the human machine to his estate must be determined in like manner. It must be maintained,—that is, it must be fed, clothed and supplied

with other necessities. What the estate would lose would be the net gain."

And in C. N. O. & T. P. Ry. Co. v. Lovell's Adm'r, 141 Ky. 249, the court said:

"The loss to his estate is the amount that he will probably make and save if he should live the full limit of his expectancy of life."

So in the case at bar, the los to the appellee is not the total amount of the decedent's earnings throughout what would have been the probably duration of his life, but what he would have saved and turned over to her, or expended for her care and maintenance. Necessarily, a large part of what decedent would have made, would have been expended in the care and maintenance of himself,
191 and for this amount appellee was not entitled to recover.

And after instructing the jury that they could award damages for the pecuniary loss sustained by appellee by reason of being deprived of the decedent's "support and maintenance," they were further told that they might award damages for the loss of any "other pecuniary advantage." How far into the fields of speculation and guess-work the jury may have gone under this unbridled license, no one can tell. The size of the verdict indicates that they took full advantage of the opportunity presented.

If this had been a case wherein a recovery was sought under the provisions of the Kentucky death statute,—Section 6,—would this court sustain an award based upon an authorization given to the jury to fix the damages by multiplying the decedent's earning capacity by his life expectancy? Or, if the action were one to recover for pain and suffering, is there any doubt that the verdict would have been set aside, if the jury had been instructed not only to consider mental and physical pain, loss of earnings, etc., but also any other pecuniary loss sustained? Both of these errors exist herein, and in view of the disproportionate size of the verdict to the loss sustained, one is drawn to the conclusion that these errors materially influenced the result of the jury's deliberations.

For the foregoing reasons, it is respectfully submitted that the judgment of the Boyd Circuit Court should be reversed, and the case remanded.

PROCTOR K. MALIN,
WORTHINGTON, COCHRAN &
BROWNING,
Counsel for Appellant.

192 *Points and Authorities.*

I.

The verdict is grossly excessive.

Ill. Cent. R. Co. v. Doherty's Adm'r., 153 Ky. 363.
Mich. Cent. R. Co. v. Vreeland, 227 U. S. 59.
Bradbury v. Chicago, Etc., Ry. Co., 128 N. W. 1.
Duke v. St. Louis, Etc., Ry. Co., 172 Fed. 684.
Cain v. Southern Ry. Co., 199 Fed. 211.
St. Louis, etc., Ry. Co. v. Hesterly, 135 S. W. 874.
Neil v. Idaho, etc., Ry. Co., 125 Pac. 331.

II.

The instruction on the measure of damages is erroneous.
Stewart's Adm'r v. L. & N. R. R. Co., 136 Ky., 717.
C. N. O. & T. P. Ry. Co. v. Lovell's Adm'r, 141 Ky., 249.

193 Court of Appeals of Kentucky.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Appellant,
vs.
SARAH DWYER, Adm'x, etc., Appellee.

Receipt.

Received of appellant a copy of its brief, which it is agreed may be filed without further notice.
This 19th day of January, 1915.

R. S. DINKLE,
Attorney for Appellee.

194 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

I, Robert L. Greene, Clerk of the Court of Appeals of Kentucky, in obedience to the commands of the Writ of Error herein, herewith transmit to the Supreme Court of the United States the transcript of the record as ordered to be copied by the præcipes in the case of Chesapeake & Ohio Railway Company, appellant, vs. Richard Dwyer's Administrator, appellee, as the same appears of record and on file in my office.
In testimony whereof I have hereunto set my hand and affixed the seal of my office.
Done at Frankfort, Kentucky, on this the 23rd day of April, A. D. 1915.

[Seal Kentucky Court of Appeals.]

ROBERT L. GREENE,
Clerk Court of Appeals.

Fee for this transcript, $49.50.

195 Supreme Court of the United States.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error,
v.
SARAH DWYER, Administratrix of the Estate of Richard Dwyer, Deceased, Defendant in Error.

In Error to the Court of Appeals of Kentucky.

Now comes the plaintiff in error, Chesapeake and Ohio Railway Company, and files with the Clerk of this court a statement of the errors on which it intends to rely, as follows, to-wit:

First. The said court erred in holding and deciding that the Boyd Circuit Court, from whose judgment the appeal was prosecuted to the said Court of Appeals, had jurisdiction of the subject matter of this action, and in refusing to reverse said judgment and remand this action to the said Boyd Circuit Court with directions to dismiss same.

Second. The said court erred in refusing to hold that by reason of the provisions of the 7th Amendment to the Constitution of the United States, jurisdiction of the cause of action herein asserted could not be conferred upon the Boyd Circuit Court, or in any way acquired by it.

Third. The said court erred in refusing to hold that by reason of its inability under the laws of the state of Kentucky to grant a jury trial by an unanimous jury of twelve, the Boyd Circuit Court was not a court of competent jurisdiction within the provisions of the Federal Employers' Liability Act, and Section 28 of the Act of Congress of March 3, 1911, known as the Judicial Code.

196 Fourth. The said court erred in holding and deciding that the said Boyd Circuit Court had committed no error in giving to the jury Instruction No. 4, which was in words and figures as follows:

"The court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

The court instructs the jury that they can not allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

Said instruction being erroneous for the following reasons:

(*a*) While the jury were thereby authorized to take into consideration in estimating the damages, certain facts, such as the decedent's age, habits, business ability, earning capacity, and probable duration of life, all of which went to enhance the amount of damage, they were not told that they might take into consideration his health, his physical condition and the hazardous nature of the employment
in which he was engaged, which were circumstances tending
197 to decrease the estimate of damage.

(*b*) Said instruction does not confine the amount of recovery to the present cash value of the reasonable expectation of pecuniary advantage to the dependent from a continuance of the life of the decedent, but permits the jury to estimate such pecuniary advantage as being equal to the probable earnings of said decedent during the whole period of life expectancy.

(*c*) Said instruction does not confine the amount of recovery within the limits of the net value of the probable earnings of the decedent during his expectation of life, after deducting from his total probable earnings the reasonable cost of his own living and maintenance.

(*d*) Said instruction does not confine the amount of recovery to the pecuniary loss sustained by the widow but permits the jury to take into consideration matters and circumstances improper for their consideration.

(*e*) Said instruction does not limit the recovery to the pecuniary loss sustained by the widow.

Plaintiff in error states that it thinks that this entire record as copied by the Clerk of the Court of Appeals of Kentucky should be printed for the consideration of the errors above relied upon, and it, therefore, designates as necessary to be printed such entire record.

Dated this 27th day of July, 1915.

E. L. WORTHINGTON,
Counsel for Plaintiff in Error.

198 A copy of the foregoing was delivered to us on the 27" day of July, 1915, and service of same is now accepted, as counsel for defendant in error.

WATT. M. PRICHARD,
R. S. DINKLE,
GEORGE B. MARTIN,
Counsel for Defendant in Error.

199 [Endorsed:] 453—24705. Chesapeake & Ohio Ry. Co. v. Sarah Dwyer, Adm'x of the Estate of Richard Dwyer, Dec.

200 [Endorsed:] File No. 24,705. Supreme Court U. S., October term, 1915. Term No. 453. The Chesapeake & Ohio Ry. Co., Pl'ff in Error, vs. Sarah Dwyer, Administratrix, etc. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed July 31, 1915.

Endorsed on cover: File No. 24,705. Kentucky Court of Appeals. Term No. 453. The Chesapeake & Ohio Railway Company, plaintiff in error, vs. James R. Gainey, Jr., administrator de bonis non of the estate of Richard Dwyer, deceased. Filed May 5th, 1915. File No. 24,705.

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JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1915

No. 453

The Chesapeake and Ohio Railway Company, ... *Plaintiff in Error,*

v.

James R. Gainey, Jr., Administrator De Bonis Non of the Estate of Richard Dwyer, Deceased . . . *Defendant in Error.*

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR

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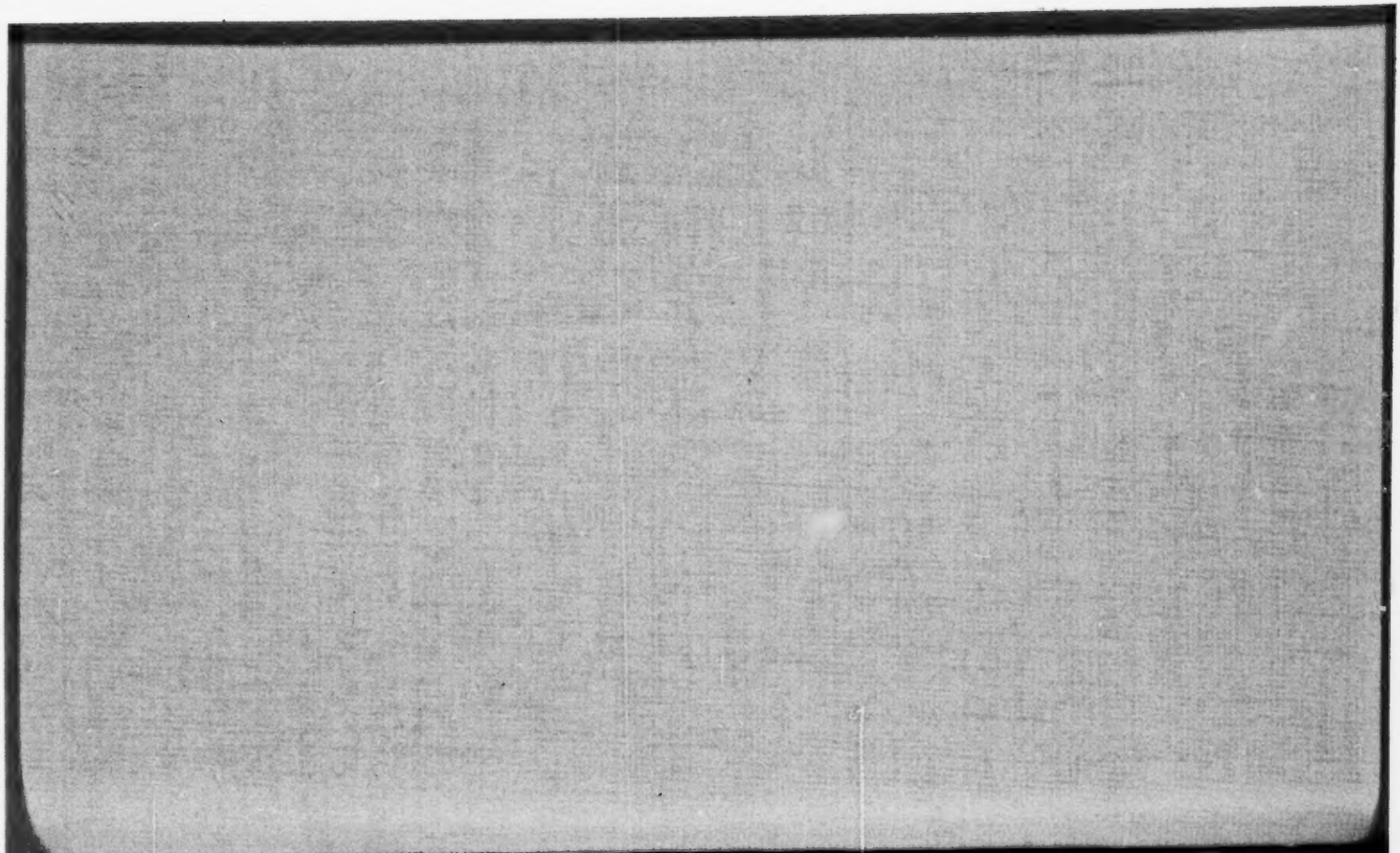

Supreme Court of the United States.

OCTOBER TERM, 1915

No. 453

The Chesapeake and Ohio Railway Company, ... *Plaintiff in Error,*

v.

James R. Gainey, Jr., Administrator De Bonis Non of the Estate of Richard Dwyer, Deceased . . . *Defendant in Error.*

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR

May It Please the Court:

STATEMENT OF FACTS

This action was originally instituted in the Circuit Court of Boyd County, Kentucky, by Sarah Dwyer, as Administratrix of the estate of Richard Dwyer, deceased, to recover damages for the death of her intestate in the derailment of one of the trains of the plaintiff in error, of which the decedent was

the engineer. The action was brought under the Employers' Liability Act of Congress, of April 22, 1908, as amended by the Act of April 5, 1910 (35 Stat. at L. 65, Chap. 149, Com. Stat. 1913, Sec. 8657).

Upon the first trial of the case in the Boyd Circuit Court, the plaintiff recovered a judgment against the defendant (the plaintiff in error herein), for the sum of $14,000.00. Upon appeal to the Court of Appeals of Kentucky, this judgment was reversed and the cause remanded to the Circuit Court. The ground of reversal was the giving of an erroneous instruction by the trial court upon the measure of damages (see page 9, et seq., Transcript, *Ches. & Ohio Ry. Co.* v. *Dwyer's Admx.*, *163 S. W.*, *752*, *157 Ky.*, *590.*)

Upon a retrial of the case in the Circuit Court, the plaintiff recovered a judgment against the defendant for the sum of $16,000.00, which judgment was subsequently affirmed by the Court of Appeals of Kentucky (see page 77, et. seq., Transcript, *Ches. & Ohio Ry. Co.* v. *Dwyer's Admx.*, *172 S. W.*, *918*, *162 Ky.*, *427*). The defendant thereupon filed a petition for rehearing (see page 80, et seq., Transcript), upon the ground that as the statutes of Kentucky required the trial court to give an instruction authorizing nine of the jury to return a verdict, the court had no jurisdiction of the action because of its inability to give to the defendant a trial by jury as provided for in the Seventh Amendment to the Constitution of the United States. A rehearing was denied (see page 84, Transcript), and from the judgment of the Court of Appeals this writ of error is prosecuted. It may be well to state that subsequent to the docketing of the case in this court, the original administratrix died, and by an agreed order of revivor,

the case was redocketed in the name of the defendant in error, as administrator *de bonis non* of the estate of Richard Dwyer.

As will be seen from the above, there were two trials of the case in the Boyd Circuit Court. The facts as disclosed by the evidence were practically the same on both trials, and may be summarized as follows: The plaintiff's intestate was a locomotive engineer in the employment of the defendant railway company. He was killed on May 12, 1910, at England Hill, in Boyd County, Kentucky, by the derailment of the train upon which he was at the time employed as engineer. The train in question was a freight train, and was being operated by two engines, the second engine being the one that the decedent had charge of. At the place of the accident the railroad track is located in a cut, the banks of which arise in height several feet above that of a train. The accident was caused by a land slide from one side of the cut, which caused rocks and earth to be deposited upon the track in such quantities that when struck by the moving train the two engines and several cars were derailed, and the decedent, being thrown under the engine of which he was in charge, received injuries which shortly thereafter resulted in his death. Several grounds of negligence were charged in the pleadings, but the only one actually relied upon was the alleged negligence of the railway company in failing to take proper precautions to prevent the land slide in question. As to this alleged negligence, the evidence was conflicting.

The sole beneficiary of the action was the decedent's widow, Sarah Dwyer, who qualified as administratrix of the decedent's estate, and as such originally instituted this action. As above stated, Mrs. Dwyer died since the granting of this writ of error.

ASSIGNMENT OF ERRORS

The errors assigned are as follows (see pages 87-89, Transcript):

First. The Court of Appeals of Kentucky erred in holding and deciding that the Boyd Circuit Court, from whose judgment the appeal was prosecuted to the said Court of Appeals, had jurisdiction of the subject matter of this action, and in refusing to reverse said judgment and remand this action to the said Boyd Circuit Court with directions to dismiss same.

Second. The said court erred in refusing to hold that by reason of the provisions of the Seventh Amendment to the Constitution of the United States, jurisdiction of the cause of action herein asserted could not be conferred upon the Boyd Circuit Court, or in any way acquired by it.

Third. The said court erred in refusing to hold that by reason of its inability under the laws of the state of Kentucky, to grant a jury trial by a unanimous jury of twelve, the Boyd Circuit Court was not a court of competent jurisdiction within the provisions of the Federal Employers' Liability Act, and Section 28 of the Act of Congress of March 3, 1911, known as the Judicial Code.

Fourth. The said court erred in holding and deciding that the said Boyd Circuit Court had committed no error in giving to the jury instruction No. 4, which was in words and figures as follows:

> "The court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by

reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife, has sustained by reason of being deprived of such support and maintenance, other pecuniary advantage, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, not exceeding, however, the sum of the aggregate probable earnings of decedent but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

"And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

"The Court instructs the jury that they can not allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death.

"Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

Said instruction being erroneous for the following reasons:

(a) While the jury were thereby authorized to take into consideration in estimating the damages, certain facts, such as the decedent's age, habits, business ability, earning capacity, and probable duration of life, all of which went to enhance

the amount of damage, they were not told that they might take into consideration his health, his physical condition and the hazardous nature of the employment in which he was engaged, which were circumstances tending to decrease the estimate of damage.

(b) Said instruction does not confine the amount of recovery to the present cash value of the reasonable expectation of pecuniary advantage to the dependent from a continuance of the life of the decedent, but permits the jury to estimate such pecuniary advantage as being equal to the probable earnings of said decedent during the whole period of his life expectancy.

(c) Said instruction does not confine the amount of recovery within the limits of the net value of the probable earnings of the decedent during his expectation of life, after deducting from his total probable earnings the reasonable cost of his own living and maintenance.

(d) Said instruction does not confine the amount of recovery to the pecuniary loss sustained by the widow but permits the jury to take into consideration matters and circumstances improper for their consideration.

(e) Said instruction does not limit the recovery to the pecuniary loss sustained by the widow.

ARGUMENT

I.

THE BOYD CIRCUIT COURT DID NOT HAVE JURISDICTION OF THIS ACTION.

The Constitution of the state of Kentucky (Sec. 248) provides as follows:

> "The General Assembly may provide that in any or all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict which shall have the same force and effect as if rendered by the entire panel."

The legislature of Kentucky carried this constitutional provision into effect by the enactment of *Sec. 2268, Kentucky Statutes*, which provides as follows:

> "That in all trials of civil actions in the circuit courts, three-fourths or more of the jurors concurring may return a verdict, which shall have the same force and effect as if rendered by the entire panel."

It is our contention, under the first three assignments of error that the limitation of the Seventh Amendment to the Federal Constitution preserving the common law right of trial by jury, i. e., a jury of twelve whose verdict must be unanimous, inheres in every right of action created under the authority of that Constitution, and that as the courts of the state of Kentucky are unable, by reason of the constitutional and statutory provisions above quoted, to secure to litigants that right, they are without jurisdiction of actions arising under the Federal Employers' Liability Act; and that, therefore, the Boyd Circuit Court was not what is denominated in the Act as a "state court of competent jurisdiction." This proposition is involved in all the cases which are heard with this case, to-wit: *The Ches. & Ohio Ry. Co.* v. *Kelley's Admx.*, (*No. 321*), *St. Louis & San Francisco R. Co.* v. *Brown*, (*No. 399*), *Minneapolis & St. Louis R. Co.* v. *Bompolis*, (*No. 478*), *Louisville & N. R. Co.* v. *Stewart's Admx.*, (*No. 485*), *The Ches. & Ohio Ry. Co.* v. *Carnahan*, (*No. 743*); and one general brief discussing this common question has been filed in each

of the cases. We refer to that brief for a full discussion of the proposition.

The proceedings in the trial courts were not, however, the same in all the cases, and this makes it necessary for us to consider herein such features as are peculiar to this case.

It may be suggested that the want of jurisdiction in the state court was not specially set up and claimed in the trial court, nor until the filing of the petition for rehearing upon the second appeal to the Court of Appeals, and that, therefore, plaintiff in error can not now be heard to present such question in this court. We are aware that the general rule is well settled that it is too late to raise a Federal question for the first time in a petition for rehearing in the state court of last resort after that court has pronounced its final decision, unless that court in fact entertains the petition for rehearing and passes on the Federal question raised therein.

But it is submitted that the aforesaid rule does not apply to a Federal question of the character here presented. If the Boyd Circuit Court did not have jurisdiction of the *subject matter* of the action, then it could not acquire such jurisdiction by the failure of the defendant to object thereto at the inception of the case or during the subsequent progress thereof. The question as to the jurisdiction of the *subject matter* of an action can not be waived but may be raised at any time, and should be raised by the court itself whenever presented to its notice. See *Mississippi & Rum River Boom Co.* v. *Patterson, 93 U. S., 403, 25 L. Ed., 206; Mansfield, Etc., R. Co.* v. *Swan, 111 U. S., 379, 28 L. Ed., 463; Cameron* v. *Hodges, 127 U. S., 322, 32 L. Ed., 132; Metcalfe* v. *City of Watertown. 128 U. S., 586, 32 L. Ed., 543; Blacklock* v.

Small, 127 U. S., 96, 32 L. Ed., 70; Chicago, B. & Q. R. Co. v. *Willard, 220 U. S., 413, 55 L. Ed., 521.* In the case last cited it was said:

> "It is firmly established by many decisions that in every case pending in an appellate Federal court of the United States, the inquiry must always be whether, under the Constitution and laws of the United States, that court or the court of original jurisdiction could take cognizance of the case. The leading authority on the subject is Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S., 379, 382, 28 L. Ed., 462, 463, 4 Sup. Ct. Rep., 510, where the cases are fully reviewed. In that case the question of jurisdiction was raised in this court by the party at whose instance the subordinate Federal court exercised jurisdiction. But that fact was held not to be decisive; for, said Mr. Justice Matthews, speaking for the court, 'on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' This rule was said to be inflexible and without exception, and has been uniformly sustained by this court."

Moreover, this particular Federal question under discussion is not the character of question that is required to be "specially set up or claimed." As has been repeatedly pointed out, there are three classes of cases in which this court is given appellate jurisdiction over final judgments of state courts of last resort, to-wit; *first,* where there is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; *second,* where there is drawn in question the validity

of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; and, *third*, where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity *specially set up and claimed* by either party under such Constitution, statute, commission or authority. See *Mutual Life Ins. Co.* v. *McGrew, 188 U. S., 291, 47 L. Ed., 480; Baltimore & P. R. Co.* v. *Hopkins, 130 U. S., 210, 32 L. Ed., 908.*

Obviously, the question under consideration falls within the second class above named, for it draws in question the validity of an authority exercised under a statute of the state of Kentucky on the ground of its being repugnant to the Seventh Amendment to the Constitution of the United States.

This being true, it follows that the requirement that the Federal question should have been "specially set up and claimed," has no application to this case. Such limitation is applicable only to the third class of cases above named,—it does not apply to cases falling within the first or second class. This difference is clearly pointed out in *Columbia Water Power Co.* v. *Columbia Electric Co., 172 U. S., 475, 43 L. Ed., 521*, wherein it was said:

> "There is no doubt that under the third class the Federal right, title, privilege or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction. * * *
>
> "But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or

> the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against review of such question here."

The question as to the jurisdiction of the Boyd Circuit Court was necessarily involved in the case, and the affirmance of its judgment was, of necessity, a decision sustaining its jurisdiction.

It is also to be noted that the defendant objected and excepted to the giving of an instruction authorizing a three-fourths verdict (see page 74, Transcript), and this alleged error was also set out and specified as one of the grounds for a new trial. Also, the verdict upon which the judgment appealed from was rendered, was returned and signed by only nine of the jury.

It is accordingly submitted that the Federal question under consideration is sufficiently presented in the Record.

II.

THE INSTRUCTION ON THE MEASURE OF DAMAGES WAS ERRONEOUS.

The Boyd Circuit Court gave to the jury the following instruction on the measure of damages (see pages 73, 74, Transcript):

> "The Court instructs the jury that if they shall find for the plaintiff under instruction No. 1, then and in this event they will find for her such a sum of money as they may find and believe from the evidence will fairly and

reasonably compensate Sarah Dwyer, the widow of the decedent, for the pecuniary loss, if any, sustained by her by reason of his death. And in fixing said amount, if any, the jury are authorized to take into consideration the decedent's age, his habits, business ability, earning capacity and the probable duration of his life, and also the pecuniary loss, if any, which the said Sarah Dwyer as his wife, has sustained by reason of being deprived of such support and maintenance, *other pecuniary advantage*, if any, which the jury may find and believe from the evidence she would have derived from decedent but for the accident in question, *not exceeding, however, the sum of the aggregate probable earnings of decedent*, but for the accident in question, nor more than the sum of $40,000.00, the amount claimed in the petition.

"And in the event the jury should find for and allow plaintiff any damages under this instruction, then and in this event they will confine or limit such recovery of damages to the period of her dependency, if any, as the widow of decedent and in no event for a longer period than her said husband would have probably lived but for the injury complained of and in question.

"The Court instructs the jury that they can not allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer."

The concluding paragraph of this instruction was given upon the defendant's motion, but there was an objection and exception by the defendant to the giving of the preceding part

of the instruction. The following errors in the aforesaid instruction are now complained of:

(a) By the above instruction (No. 4) the jury were told to award the widow of the decedent such sum as would reasonably compensate her for the pecuniary loss sustained, not to exceed the "aggregate probable earnings of the decedent." The effect of the instruction was to authorize the jury to award in a lump sum the aggregate of what the widow would have received from year to year during the whole of the decedent's life. That the jury did exactly this, is inferable not only from the size of the verdict, but also from the fact that the Court of Appeals of Kentucky adopted this manner of computation in order to sustain the verdict.

It is earnestly submitted that a verdict based upon the above method of calculation does not represent the actual pecuniary loss sustained. To avoid a result so manifestly erroneous as that reached in this case, the jury should have been told to award a sum which represented the *present cash value* of the reasonable expectation of pecuniary advantage to the surviving dependent.

The proper measure of damages in such cases was clearly stated by the Court of Errors and Appeals of New Jersey in *Hackney* v. *Delaware & A. T. & T. Co., 69 N. J. Law, 335, 55 Atl., 252*, where it is said:

> "In none of the cases cited has it been in express language set forth that it is the present value of the pecuniary loss which the jury is to find, although such an expression is usually found in the charges of the trial judges at the circuit. In the charge before us, the jury were permitted to consider the whole amount of the possible pecuniary benefits which the widow and next of kin would have re-

ceived from time to time during the life of the intestate had he lived, and to sum that up as the measure of damages. That instruction did not require the taking into account of the present possession of the whole fund, and the resultant benefit therefrom, and the future accretions thereon, and hence was erroneous."

And in *McCabe* v. *Narragansett E. L. Co., 26 R. I., 427*, the following method of computing the loss to the surviving dependents is stated:

> "It is obvious, too, that the loss sustained by the plaintiff here is the present cash value of the net result remaining after his personal expenses are deducted from his income or earnings. To ascertain this, it is, of course, necessary to ascertain first the gross amount of such prospective income or earnings; then to deduct therefrom what the deceased would have to pay out, as a producer, to render the service or to acquire the money that he might be expected to produce, computing such expenses according to his station in life, his means and personal habits; and then to reduce the net result so obtained to its present value."

To the same effect are the following decisions: *Louisville & N. R. Co.* v. *Trammel, 93 Ala., 354; Benton* v. *R. R. Co., 122 N. C., 1007, 30 S. E., 333; Rudiger* v. *Chicago, Etc., Ry. Co., 101 Wis., 292, 77 N. W., 169; Southern R. Co.* v. *Hill. 139 Ga., 549, 77 S. E., 803; Irvin* v. *Southern R. Co., 164 N. C., 5, 80 S. E., 78, 7 N. C. C. A., 824, (Note C); Thornton* v. *Seaboard A. L. R. Co., 98 S. C., 348, 7 N. C. C. A., 824, (Note C).*

Manifestly, the rule laid down in the foregoing decisions states the correct method of computing the damages sustained, as the dependent beneficiary is entitled to receive only

that of which he was deprived by the death, which is an annuity during the continuance of the dependency, and if the amount of the annuity be simply multiplied by the number of years of the dependency, and the product paid at once in cash, the beneficiary receives much more than the actual loss sustained, as was the result in the case at bar. The expectation of the decedent in this instance was approximately twenty-four years. At the time of his death he was earning regularly $150.00 per month, or $1,800.00 per year. Of this amount, the widow could not reasonably have expected more than half, or $900.00 per year, even if the decedent had maintained his earning powers unimpaired for the remainder of his expectancy. The present value of a right in a sum which would yield at a 6 per cent rate of interest an income of $900.00 per year for the full period of the decedent's expectancy would only be $9,150.00, an amount considerably less than the verdict returned in this case. Or, to look at the matter in another way, the amount awarded by the jury would at 6 per cent,—the legal rate of interest in Kentucky,—yield an annual income to the widow of $960.00 per year, and at the end of the period of expectancy she would still be in possession of the full amount of the principle. This court, of course, can not revise the finding of a jury because the verdict may have been excessive. But the above figures are presented for the purpose of showing that the jury, acting under the authorization contained in the instruction upon the measure of damages, necessarily adopted an unlawful method of computation. That this was probably done by the jury is evidenced by the fact that this was actually done by the Court of Appeals of Kentucky in sustaining the verdict.

(b) Said instruction is also erroneous in that it authorized

the jury to return a verdict for an amount "not exceeding the sum of the aggregate probable earnings of decedent." It is a manifest proposition that the widow's pecuniary loss could not possibly have equalled the sum of the aggregate earnings of the decedent, for out of these earnings would necessarily have to come the decedent's incidental living expenses. The instruction as worded was necessarily confusing and misleading. Under it the jury were authorized to infer that the widow's pecuniary loss could equal the sum of the decedent's aggregate earnings, which is plainly wrong.

Furthermore, it is submitted that the amount of the decedent's earnings, either gross or net, do not furnish a guide for computing the pecuniary loss sustained by the surviving dependent. If the right of action was one for the recovery of damages sustained by the decedent's estate, as is the case under the Kentucky statute permitting a recovery for death by the wrongful act of another, then the sum of the probable aggregate net earnings of the decedent might be accepted as the limit to which a jury could go in their verdict. But under the Federal Act, the recovery is not for the loss sustained by the estate, but for the loss resulting to the beneficiaries named. The same criticism can be made of this instruction as was made by this court of the instruction considered in *Kansas City Southern R. Co.* v. *Leslie, 238 U. S., 599, 59 L. Ed., 1478.*

(c) By said instruction the jury were advised that they might take into consideration "the pecuniary loss * * * which the said Sarah Dwyer as his wife has sustained by reason of being deprived of such support and maintenance, (and) *other pecuniary advantage*, if any, which the jury may find

and believe from the evidence she would have derived from decedent." The effect of the authorization thus given to award damages for the loss of *other pecuniary advantages*, was to permit the jury to consider and award damages for matters not susceptible of measurement by money standard. How far the jury may have gone into fields of guesswork and speculation under this unbridled license, no one can tell, but the size of the verdict indicates that they took full advantage of the opportunity presented. So extremely indefinite is the term "other pecuniary advantage," that the jury may well have taken into consideration and included in their award damages for the loss of the decedent's care and companionship, and therefore, the instruction falls under the ban of the criticism made of such an instruction in *American Railroad Co.* v. *Didrickson*, *227 U. S.*, *145*, *57 L. Ed.*, *456*. See also *New York, Etc., R. Co.* v. *Niebel*, *214 Fed.*, *952*.

It is certain that the term "other pecuniary advantage," as used by the trial court, is not synonymous with the words "support" and "maintenance," and the jury must necessarily have understood the term to mean some loss in addition to the loss of support and maintenance. This being true, it following that the direction to award damages for the loss of such "other pecuniary advantages," was not authorized by the pleadings or the evidence, as there was neither allegation or proof of any loss sustained by the widow other than the loss of support and maintenance. See *Michigan Cent. R. Co.* v. *Vreeland*, *227 U. S.*, *59*, *57 L. Ed.*, *417*.

The foregoing errors are accentuated by the disproportionate size of the verdict to the loss sustained by the widow.

who was the sole beneficiary, and who died herself five years after the death of her husband.

It may be well to state that under the Kentucky practice, the defendant is not estopped to complain of the foregoing errors in the instruction under consideration because of the fact that it did not offer a correct instruction on the measure of damages. The right of the defendant, under the state practice, to complain of any errors in the instruction, is stated in the opinion delivered herein by the Court of Appeals upon the first appeal, (see *Ches. & Ohio Ry. Co.* v. *Dwyer's Admx.*, *157 Ky.*, *590*, *163 S. W.*, *752*), as follows:

> "It is insisted for appellee that, as appellant did not on the trial offer a correct instruction on the measure of damages, it is estopped to ask a reversal of the judgment appealed from because of the giving of the incorrect instruction by the trial court on that subject. This contention must be overruled. It is true that an instruction on the measure of damages was not offered by appellant, but such failure did not relieve the trial court of the duty of correctly instructing the jury on that subject. Having attempted to give an instruction on that feature of the case, it was the duty of the court to state it in correct form. Its failure to do so was prejudicial to the rights of appellant, and as it objected to the instruction as given, it is not estopped to insist upon a reversal of the judgment because of the error committed by the trial court in giving the instruction. L. & E. Ry. Co. v. Crawford, 155 Ky., 723, 160 S. W., 267; South Cov. & C. St. Ry. Co. v. Core, 96 S. W., 562, 29 Ky. Law Rep., 836."

See also, *Louisville, H. & St. L. Ry. Co.* v. *Roberts*, *144 Ky.*, *820*, *139 S. W.*, *1073*.

It is respectfully submitted that the judgment of the Court of Appeals of Kentucky should be reversed.

E. L. Worthington

W. D. Orchard

Talbott Browning

P. K. Wallace

Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1915.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error.

Against) No. 453.

JAMES R. GAINEY, JR., Administrator, Etc., Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

MAY IT PLEASE THE COURT:

STATEMENT OF FACTS.

The deceased, Richard Dwyer, while employed by the plaintiff in error as engineer, lost his life, on the 12th day of May, 1910, by negligence of the Railway Company, in permitting a large rock to remain on the side of a deep cut on its right-of-way, and in allowing said rock to fall upon its track, thereby

causing the engine which deceased was operating to turn over and kill him.

A trial was had of this action, at the March term of the Boyd Circuit Court, 1913, and a verdict and judgment for $14,000.00 was rendered. An appeal was taken to the Court of Appeals of Kentucky by plaintiff in error, and the judgment of the lower court was reversed on the ground that the instruction given on the measure of damages was erroneous. The opinion on that appeal will be found in 157, Ky., 590, and at page 10 of the record.

A second trial of the action was had at the June term, 1914, of the Boyd Circuit Court, and a judgment and verdict for $15,000.00 were rendered, from which an appeal was taken to the Court of Appeals of Kentucky and there affirmed. (Record, page 77). The opinion upon this appeal will be found in 162 Ky., 427. A petition for rehearing in this cause, in the Court of Appeals of Kentucky, was filed by plaintiff in error (Record, page 80), which was overruled by said court (Record, page 84). A petition for a writ of error was then filed by it in said court (Record, page 85), which was allowed (Record, page 86), and assignment of errors made by it (Record, page 87).

ARGUMENT

The first contention of plaintiff in error is, that the Boyd Circuit Court did not have jurisdiction of this action because a trial thereof in said court is inhibited by reason of the Seventh Amendment to the Constitution of the United States. That question is involved in all the cases which are heard with this case, to-wit: The Chesapeake and Ohio Ry. Co. v. Kelly's Admx., (No. 321); St. Louis & San Francisco R. Co. v. Brown, (No. 399); Minneapolis & St. Louis R. Co. v. Bombolis, (No. 478); Louisville & Nashville R. Co. v. Stewart's Admx., (No. 485); The Chesapeake & Ohio R. Co. v. Carnahan, (No. 743); and one general brief discussing this common question has been filed in each of the cases. We refer to that brief for a full discussion of the proposition. We desire to add to what is there said, that the contention that the trial of this character of case in the State Court is unwarranted because of the Fourteenth Amendment to the Constitution of the United States does not arise in the case at bar because not assigned as error or properly made a ground for reversal herein, and by reason of its failure to do so it cannot be heard to urge that the trial in the State Court was unauthorized, because of said Fourteenth Amendment.

See,

Chapin v. Fye, 45 L. Ed., (U. S.) 119.

in which case the Supreme Court, discussing the above proposition, said:

"A constitutional question which will

> give jurisdiction to the Supreme Court of the United States on writ of error to a state court is not raised by a contention in the state court that the state law in question violates the 5th and 7th Amendments of the Federal Constitution, and a contention, made in the assignment of errors in the Supreme Court of the United States, that the law violates the 14th Amendment, since the constitutional question must be raised in the state court, and the reference to the 5th and 7th Amendments is insufficient for that purpose because those amendments have no application to the powers of the State."

But if it should be held that the assignment of errors as to the Seventh Amendment carries with it the Fourteenth Amendment, we insist that the Fourteenth Amendment does not prohibit the state court, in which the law does not require a unanimous verdict of the jury, from trying an action arising under Federal law.

In deciding the case of **Gibson v. Bellingham & N. Ry. Co., 213 Fed., 488,** the Court said:

> "It has been frequently held that this provision contemplated a jury as constituted at common law of which the unanimous verdict of twelve men was an essential feature. Thompson v. Utah, 170 U. S., 343; American Pub. Co., v. Fisher, 166 U. S., 464; Rasmussen v. United States, 197 U.S., 516; Black v. Jackson, 177 U.S., 349. Those were cases, however, arising in the United States District or Circuit Courts, or in the territories, the courts of which were created by

Congressional act. It has been held by a long line of decisions that the Seventh Amendment does not apply to the states, and that a state is not inhibited by the federal constitution from providing for a jury of less than twelve men, or for a verdict that is not unanimous. Edwards v. Elliott, 21 Wall. 532; Barron v. Baltimore, 7 Pet. 243; Twitchell v. Pennsylvania, 7 Wall. 321; Walker v. Sauvinet, 92 U.S., 90; Maxwell v. Dow, 176 U. S., 581.

"Nor is a trial under a state statute abridging the number of jurors, or dispensing with the feature of unanimity, a denial of 'due process' within the inhibition of the 14th amendment which does not apply to the States. Hurtado v. California, 110 U. S., 517; Kennard v. Louisiana, 97 U. S. 480; Davidson v. New Orleans, 96 U. S. 97. Congress cannot enlarge the jurisdiction of a state court, nor has it power to prescribe rules of procedure or methods of trial to be followed in a state tribunal. Claflin v. Houseman, 93 U. S., 141."

It is necessary, under the law of Kentucky, in order to raise the question of jurisdiction of the lower court to try a cause, to either file a special demurrer or a plea to the jurisdiction of the trial court, before any steps are taken by a defendant therein.

See,

Sections 92 and 118, Ky. Civil Code of Practice.

The plaintiff in error not only failed to raise the question of jurisdiction in the trial court, but failed

to raise it in the appellate court on appeal thereto, except in its petition for a re-hearing after the case had been decided by that court, which petition for re-hearing the said appellate court overruled without responding thereto, (Record, page 84). This is not sufficient to bring the question before this court on a writ of error.

> Winona & St. Paul Land Co. v. Minn., 159 U. S., 540; Zimmerman v. Nebraska, 115 U. S., 54; Webber v. Rogan, 188 U. S., 10; Pim v. St. Louis, 165 U. S., 273; Mallet v. North Carolina, 188 U. S., 589; Chappell v. Bradshaw, 128 U. S., 117; Seaboard Air Line Ry. Co. v. Duval, 225 U. S., 77; Mutual Life Ins. Co. of N. Y. v. McGraw, 188 U. S., 291; Forbes v. State Council of Va., 216 U. S., 396; 54 L. Ed., 534; Waters Pierce Oil Co. v. Texas, 212 U. S., 112; 53 L. Ed., 431.

In the case of,

McCorquodale v. Texas, 211 U. S., 432.

the Court said:

> "An order of the highest court of the state on motion for rehearing, which recites that the cause came on to be heard on said motion, and 'the same being considered by the court, said motion is overruled', does not show that the court passed on the federal question, so as to sustain a writ of error from the Supreme Court of the United States."

In passing on the petition for rehearing in the case at bar, the Court entered the following order:

> "The court being sufficiently advised,

orders that the petition for rehearing herein be and the same is now overruled."

It is true that the plaintiff in error excepted to the giving of instruction No. 6 by the trial court, (Record, page 75), but we submit that this did not call the attention of the trial or appellate courts to the question of jurisdiction here involved.

THE INSTRUCTION OF THE LOWER COURT DEFINING MEASURE OF DAMAGES WAS NOT ERRONEOUS.

1.

This instruction is criticised because the jury, in ascertaining the pecuniary loss to the widow, was authorized to consider the age, habits, business ability, and the probable duration of life of the decedent.

If these are not relevant facts properly to be considered in determining the loss to the widow, we cannot conceive what would be; certainly all of them have a direct bearing on the question. The contention, if so, that such facts tend to enhance the damages, is no ground of complaint.

If his age was such that there was a long expectancy to him; his habits good, so as to warrant the belief that his earnings would not be wasted or his health impaired thereby; his business ability of the kind that would justify a finding that he would be able to get and hold positions of profit; and if

the probable duration of life under all the proven facts would have been many years, then why in fairness and justice should not such matters be considered? The Court did not tell the jury, as claimed by plaintiff in error, that these facts should enhance the damages, but simply advised the jury to consider decedent's age, whether old or youthful; his habits, whether good or bad; his business ability, whether of a high or low order; the probable duration of his life, whether long or short.

The claim that the jury should have been further advised to consider his health and the hazardous nature of his employment is without merit, because these were necessarily involved in a consideration of the probable duration of life. We shall not notice this contention further, as plaintiff in error has apparently abandoned it in argument and has contented itself with referring to it only as one of the assignments of error.

II.

More hypercritical, if possible, than the above, is the complaint of the language to the effect that the recovery should not exceed the "aggregate probable earnings of decedent".

We are at loss to know how this could have prejudiced the Railway Company and we are not enlightened to any extent by its brief. By no possibility could any man of the least common sense construe the language used to mean anything more or less than it says, and that is, that the finding should be measured by the pecuniary loss to the

widow, but in no event could exceed the aggregate probable earnings of decedent. It was simply a limitation upon the amount of recovery, perhaps not necessary, but certainly not misleading.

III.

The Court permitted the jury to consider, in addition to the widow's loss of support and maintenance, "other pecuniary advantage, if any", which she might reasonably have expected to have derived from her husband but for his death. This, we submit, the law allows. If there was no proof of any such pecuniary advantage, the law so given was an abstract proposition and the language possibly unnecessary but harmless. If the proof warranted a reasonable inference that there was a reasonable expectation that she would have received such pecuniary advantages other than her support, she was entitled to the benefit of it. "Pecuniary" advantage is one of a money nature and such as the decisions under the Employer's Liability Act recognize as proper for consideration.

IV.

It is further contended that the jury should have been told to award plaintiff a sum which represented the **present cash value** of the reasonable expectation of pecuniary advantage to the surviving dependent. Cases from various state courts are cited to sustain this contention. However, no decision by this

Court, or of any Federal Court, is cited holding that the amount of recovery should be so ascertained. There is not, among the many decisions rendered by this Court construing the Federal Employer's Liability Act, a single one in which this theory of calculation is adopted. On the contrary, the substance and effect of all of them, as we understand them, is to fix the criterion of recovery at the pecuniary loss to the surviving beneficiary.

The Court of Appeals of Kentucky, in responding to a similar contention made in the case of **C. & O. Ry. Co. v. Kelly's Admr., 160 Ky., 296,** holds same to be without merit, and, in the opinion, says:

> "Appellant insists, under the principles of Gulf & Colorado Railway Co. v. McGinnis, 228 U. S., 173, and Mich. Central Co. vs. Vreeland, 227 U. S., 59, that what the beneficiary is entitled to is not a lump sum equal to what he would receive during the estimated term of dependency, but the present cash value of such aggregate amount. In other words, the amount awarded ought to be such that if placed at interest, would be wholly consumed when the time of dependency ceased and that the jury should have been so instructed. In the McGinnis case, supra, the court construes the Employer's Liability Act to provide compensation to certain surviving relatives of the employe, 'for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given'. With reference to the apportionment of the benefit of each, the jury must do this, 'measured by his or her individual loss'. We are unable to see that

the McGinnis case, supra, either in principle or by intimation, requires that the measure of damages in the instruction to juries should be any different from the one in this case. In fact, the instructions, as above quoted, seem to have been drawn to conform to the principles announced in the McGinnis case. The instructions limited recovery to the actual pecuniary loss. Their whole loss was sustained at the time of his death. There is no more reason in appellant's asserting that the defendant should have discounted the loss than there is that the Railway Company should be adjudged to pay a fixed sum annually, semiannually, or monthly for their support. The award of the jury should be for the pecuniary loss suffered.

While that loss is, in a measure, future support, the father's death precipitated it, so that it is all due, and we are not impressed with the argument that the sum due should be reduced by rebate or discount. The value of a father's support is not so difficult to estimate, and the average juryman is competent to compute it, but to figure interest on deferred payments, with annual rests, and reach a present cash value, of such loss to each dependent is more than ought to be asked of any one less qualified than an actuary. We believe the instructions are not only right in form and in principle, but are in harmony with the McGinnis case."

The instruction in the case at bar is the same in substance and almost identical in words with the one given in the Kelly case from which the above quotation is made.

V.

It is admitted by brief of counsel for plaintiff in error that this Court has no power to revise a finding of damages by the lower court on ground of excessiveness. Therefore, it becomes unnecessary for us to respond to the claims made by counsel that the finding in this case was excessive. We believe it can be clearly demonstrated that the pecuniary loss to the widow, the sole beneficiary, was in excess of the verdict found by the jury, but for the reason given do not feel that it is necessary to do more than call the Court's attention to the opinion of the Kentucky Court of Appeals, appearing on page 77 of the Record, where it is conclusively shown that the widow would have probably received in money from her husband, had he lived, an amount in excess of the jury's finding.

Further referring to the instruction on the measure of damages as a whole, we wish to direct the Court's careful attention to the entire instruction with the confident belief that it will be found by the Court that the instruction was so guarded and carefully worded, as that the jury could not possibly have been misled into believing that they were authorized to find any sum for the plaintiff other than what would compensate her for the pecuniary loss occasioned by the death of the decedent. It does not, as claimed by plaintiff in error, authorize the jury to go into fields of speculation in fixing the damages. Not only in one place in the instruction, but in three different places, the jury is told

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
M. J. BARNOW. } No. 962.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and in accordance with the Criminal Appeals Act, 34 Stat. 1246 moves the court to advance this cause for hearing on a day convenient to the court at the next term.

Defendant was indicted in the District Court of the United States for the Eastern District of Pennsylvania for falsely pretending to be an employee of the United States, to wit, an agent employed by the Government to sell a certain set of books entitled "Messages and Papers of Presidents," with intent to defraud certain persons, in violation of section 32, chapter 4, of the Criminal Code.

A demurrer to the indictment was sustained, the court holding in substance that under section 32 the

gist of the offense is the false impersonation of an officer or employee of the United States and that that section does not include impersonation of an agent of the Government to sell books where no such employee exists.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

MAY, 1915.

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distinctly that the recovery should be measured by the pecuniary loss to the widow.

This is the central idea embodied in the instruction and is the same advanced in all the opinions where the question was involved in cases decided by this Court.

In each and all of such cases, and cases involving like questions in the lower Federal Courts, the same idea is expressed, and the measure of damages, in substance, always stated to be the pecuniary loss which the dependent's beneficiary suffered. Indeed, counsel for plaintiff, in effect, as we understand their brief, recognize that this is the correct measure, their complaint only being that the instruction did not go into further detail by advising the jury as to how they would arrive at this pecuniary loss. In other words, there is practical confession that the instruction was right, (aside from the criticisms as to certain phrases used which we have heretofore noticed), but that it did not go far enough.

ALLEGED ERROR IN INSTRUCTIONS WERE NOT PROPERLY PRESERVED EITHER UNDER THE STATE PRACTICE OR THE PRACTICE OF THIS COURT.

It is our contention that the plaintiff in error waived whatever error, if any there was, in the measure of damages instruction. Upon the motion

of the Railway Company, the following part of that instruction was given by the Court, viz:

> "The Court instructs the jury that they cannot allow plaintiff any sum in damages for any pecuniary loss sustained by the children of the decedent, Richard Dwyer, as the result of his injury and death. Said children are not entitled to recover any damages for the injury and death of the decedent, **and in the event that the jury should find for the plaintiff they will consider only the pecuniary loss, if any, sustained by his widow, Sarah Dwyer, by reason of the death of the decedent, Richard Dwyer.**"

This clause of the instruction was added to the preceding part which the Court had prepared, upon motion of the Railway Company, which was, in effect, a request that the instruction prepared by the Court be modified to the extent indicated in this clause. Though formal exception was taken to the preceding part of the instruction, yet the asking that it be modified in the manner stated was, in effect, an acquiescence by the Railway Company in giving the instruction as modified by the clause prepared by its counsel.

By this very clause, the Court will note that the Railway Company asks the Court to tell the jury that the damages should be measured by the pecuniary loss to the widow.

This is the same idea expressed in the former part of the instruction and by its asking that the damage should be so measured, it led the parties

to believe, and the Court to believe, that the instruction was satisfactory, in fixing the pecuniary loss as the criterion without going into any further details, by advising the jury as to how this should be ascertained. They were content to have the question put to the jury in this form, without the modification which they now contend should have been added, to the effect that they could only allow the present cash value of the reasonable expectation of pecuniary advantage. If error, it was in failing to incorporate this into the instruction it was invited by the Railway Company and of which, under the circumstances, they are clearly estopped to complain.

Furthermore, the failure to incorporate the present value theory, and the failure to call the jury's attention to the matter of the health of decedent and hazardous nature of his employment, if error at all, was not sufficiently preserved for review by this Court, either under the practice in the state Court or under the practice of this Court. To have preserved such question as error, it was necessary that the plaintiff in error should have offered an instruction embodying these ideas. If the instruction was correct in form, as we have argued, then the only error consisted in the failure of the Court to instruct upon questions above mentioned. If the Court gave the law right so far as it went, it is not its duty to give all of the law.

In the case of L. & N. Ry. Co. v. Woodford, 153 S. W., 722, 156, Ky., 398, the Court of Appeals of Kentucky said:

"It is not the duty of the trial judge,

> in a civil case, to give all the law of the case, and a party desiring an instruction upon which no instruction is given, or upon which those given are incomplete, must request it in order to entitle himself to have the question reviewed."

In Patterson v. Moss, 97 S. W., 379; 30 Ky. L. R., 10, the Court of Appeals of Kentucky said:

> "It is a well settled rule of this court that a litigant cannot complain of instructions, correct in themselves though inadequate, given by the court unless he offers additional instructions to be given in lieu thereof."

In L. & N. Ry. Co. v. Wilkin's Guardian, 136 S. W., 1024, the Court said:

> "Where the court has given an instruction in the terms asked by a party, he, having obtained all he asked, cannot complain that the court has not gone further than he asked by giving other instructions, although it might properly have done so."

The above is applicable to the case at bar, because the Railway Company asked, and the Court gave, an instruction making the criterion of recovery the pecuniary loss to the widow. Not having asked the Court to go further and explain how this pecuniary loss should be determined, it is not in position to complain.

In L. & N. v. Simrall's Admr., 127 Ky., 55;

104 S. W., 1011, the Court of Appeals of Kentucky said:

> "It is a well settled rule of this court that a litigant cannot complain of instructions, correct in themselves though inadequate, given by the court, unless he offers additional instructions to be given in lieu thereof."

In Loughridge v. Baugh, 118 S. W., 321 the same court said:

> "The plaintiffs asked no instruction defining further adverse possession, and as the instruction which the court gave is correct as far it goes, the plaintiffs cannot complain that other instructions were not given."

In Burdette vs. Mullins' Extr., 110 S. W., 855, the same court said:

> "The defendant did not ask any other instruction on the trial. Our rule is not to reverse a case for the failure of the court to give any instructions which the appellant did not ask, where the instructions which the court gave are correct as far as they go."

It is a settled policy of this Court, evidenced by many decisions, not to permit a party to rely for reversal upon alleged error unless specifically drawn to the attention of the lower court.

It was held by this Court in the case of Ill. Cent. Ry. Co. v. Skaggs, (Advance opinions, October Term, 1915, page 251), that even where error was sufficiently preserved under the state practice, that

this Court would not notice it unless preserved as required by its practice. The Court said:

> "While under the local statute (Gen. Stat., Minn., Sec. 7830), the plaintiff in error was permitted, (without taking exceptions at the trial), to specify upon motion for new trial, alleged errors in the rulings on instructions of the trial court, we do not find that this statute alters the salutary rule that a party is not entitled to sit silent until after the verdict and then insist that it should be set aside because of the failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called."

Therefore, we contend that if the plaintiff in error desired any addition amplification, or qualification, in order to present its point of view to the jury, it should have made appropriate request therefor.

We respectfully submit that there was not substantial error in the proceedings of the lower court warranting a reversal, none that was prejudicial, and that error, if any committed, was invited by plaintiff in error and was not sufficiently preserved under the State or Federal practice to warrant review by this Court. Substantial justice has been done and an affirmance is respectfully prayed.

R. S. DINKLE, Catlettsburg, Ky.,
WATT M. PRICHARD, Catlettsburg, Ky.,
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Attorneys for Defendant in Error.

POINTS AND AUTHORITIES.

1. Objection to the jurisdiction of the lower court was not seasonably made.

Chapin v. Fye., 45 L. Ed. (U. S.), 119;
Ky. Civil Code of Practice, Sec. 92 and 118;
Winona & St. Paul Land Co. v. Minn., 159 U. S., 540;
Zimmerman v. Nebraska, 115 U. S., 54;
Webber v. Rogan, 186 U. S., 10;
Pim v. St. Louis, 165 U. S., 273;
Mallett v. North Carolina, 188 U. S., 589;
Chappell v. Bradshaw, 128 U. S., 117;
Seaboard Air Line v. Duval, 225 U. S., 77;
Mutual Life Ins. Co. of N. Y. v. McGrew, 188 U. S., 291;
Forbes v. State Council of Va., 216 U. S., 396; 54 L. Ed., 534;
Waters Pierce Oil Co. v. Texas, 212 U. S., 112; 53 L. Ed., 431.

2. Order on motion for rehearing overruling same without response does not show that lower court passed on federal question so as to sustain a writ of error.

McCorquodale v. Texas, 211 U. S., 432.

3. Complaint that certain phraseology used in the measure of damage instruction was misleading is without merit, because it is evident that plaintiff in error was not prejudiced thereby.

4. Present cash value theory is not correct in principle and has never been sanctioned by the Supreme Court of the United States or lower Federal Courts.

   C. & O. Ry. Co. v. Kelly's Admr., 160 Ky., 296.

5. There was no substantial error in the measure of damage instruction, as a consideration of it as a whole shows clearly that the jury were limited to finding the "pecuniary loss" to the dependent beneficiary.

6. If errors were in the measure of damage instruction, same were invited by plaintiff in error and were not properly preserved as ground of error either under the state practice or the practice of this court.

   L. & N. Ry. Co. v. Woodford, 153 S. W., 722; 156 Ky., 398;
   Patterson v. Moss, 97 S. W., 397; 30 Ky., L. R., 10;
   L. & N. Ry. Co. v. Wilkin's Guardian, 136 S. W., 1024;
   L. & N. Ry. Co. v. Simrall's Admr., 127 Ky., 55; 104 S. W., 1011;
   Loughridge v. Baugh, 118 S. W., 321;
   Burdette v. Mullin's Extr., 110 S. W., 855;
   Ill. Central Ry. Co. v. Skaggs, (Advance Opinions U. S., Oct. Term, 1915, page 251).